Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States
October Term, 1996

STATE OF MICHIGAN, et al,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent,

and

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN,
Intervenor-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A parcel of land originally allotted by the United States to a Tribal member under the provisions of a treaty was later removed from trust and sold into non-Indian ownership, thus subjecting it to state *ad valorem* property taxes. It has now been purchased by the Tribe and is held in unrestricted fee simple.

May the state continue to impose *ad valorem* property taxes upon the parcel even though it was originally allotted under the provisions of a treaty rather than under the General Allotment Act?

LIST OF PARTIES

The defendants in the courts below and the Petitioners in this Court are the State of Michigan, County of Isabella; Union Township; Isabella Township; Denver Township; Chippewa Township; City of Mt. Pleasant; John M. Engler, Governor of the State of Michigan; Douglas B. Roberts, Michigan State Treasurer; Thomas M. Hoatlin, Commissioner of Revenue, Revenue Division, Michigan Department of Treasury.

The Respondent in this case is the United States of America on behalf of the Saginaw Chippewa Indian Tribe and its members.

The Intervenor-Respondent in this case is the Saginaw Chippewa Indian Tribe of Michigan.

Duane Sherwood, Union Township Tax Assessor, and Steven Pickens, Isabella County Treasurer, were named as defendants in the initial complaint filed by the United States, but were not named either in the amended complaint filed by the United States or in the complaint filed by the Tribe and they have not participated as parties below and are not parties in this Court.

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OPINIONS BELOW

1. The unpublished Order of the Court of Appeals for the Sixth Circuit, denying Petitioners' Petition for Rehearing En Banc, was filed on March 31, 1997, and is reprinted in the Appendix. App. to Pet. 1a.

2. The published Opinion of the Court of Appeals for the Sixth Circuit, reversing the decision of the District Court, was decided and filed on January 22, 1997, and is reported at 106 F.3d 130 (6th Cir. 1997); it is also reprinted in the Appendix. App. Pet. 2a.

3. The published Opinion of the District Court for the Eastern District of Michigan, Northern Division, was decided and filed on March 23, 1995; it is reported at 883 F. Supp. 659 (ED Mich. 1995) and is reprinted in the Appendix. App. to Pet. 11a.

4. The unpublished Judgment of the District Court for the Eastern District of Michigan, Northern Division, was filed on March 23, 1995 and is reprinted in the Appendix. App. to Pet. 46a.

5. The District Court's unpublished Order Denying Plaintiff Saginaw Chippewa Tribe's Motion to Alter and Amend in Part and Granting Same in Part, was filed on April 17, 1995 and is reprinted in the Appendix. App. to Pet. 48a.

JURISDICTION

Petitioners seek review of a published Opinion of the United States Court of Appeals for the Sixth Circuit in a case involving the interpretation and application of two treaties entered into with the Saginaw Chippewa Indian Tribe and of related federal statutes. The opinion of the Sixth Circuit was decided and filed on January 22, 1997. A timely Petition for Rehearing En Banc was filed and was denied by Order of the Sixth Circuit dated March 31, 1997. This Petition for Certiorari is filed within 90 days of that March 31, 1997, Order.

The Opinion of the Sixth Circuit in this case is in direct conflict with the opinion of the Ninth Circuit in *Lummi Indian Tribe v. Whatcom County, Washington*, 5 F.3d 1355 (9th Cir. 1993), *cert den* at ___ U.S. ___; 114 S. Ct. 2727; 129 L. Ed. 2d 850. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the final judgment or decree of the Court of Appeals for the Sixth Circuit.

TREATY AND STATUTORY PROVISIONS

This case concerns the interpretation and application of the following treaty and statutory provisions, all of which are reproduced in the Appendix:

1. The General Allotment Act, § 1, as enacted, 24 Stat. 388 (1887). App. to Pet. 50a.

2. The General Allotment Act, § 5, as enacted, 24 Stat. 388, 389 (1887). App. to Pet. 51a.

3. The General Allotment Act, § 6, as enacted, 24 Stat. 388, 389 (1887). App. to Pet. 52a.

4. The General Allotment Act, § 6, *as amended* by the Burke Act, 34 Stat. 182 (1906). App. to Pet. 54a.

5. Article 1, as amended, of the August 2, 1855, Treaty with the Chippewa Indians of Saginaw, Swan Creek, and Black River, 11 Stat. 633 (1855). App. to Pet. 56a.

6. Article 1 of the July 31, 1855, Treaty with the Ottawas and Chippewas, 11 Stat. 621 (1855). App. to Pet. 57a.

7. Article 3 of the October 18, 1864, Treaty with the Chippewa Indians of Saginaw, Swan Creek, and Black River, 14 Stat. 657 (1864). App. to Pet. 60a.

CONCISE STATEMENT OF THE CASE

I. Introduction

This Petition for Certiorari presents a conflict between federal circuit courts of appeal as to whether this Court's rationale in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), regarding the taxation of allotted Indian lands, is limited to lands allotted under the General Allotment Act of 1887 or whether it also extends to similarly situated Indian lands allotted pursuant to treaty provisions.

In *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), this Court held that, when Congress enacted section 5 of the General Allotment Act of 1887,[1] authorizing the alienation of Indian lands allotted under that act, Congress necessarily also consented to the imposition of state *ad valorem* property taxes upon such lands, even where those lands are owned by a tribe or its members. At the conclusion of the Court's opinion, the majority explicitly left open the question of whether a different result might obtain as to lands allotted pursuant to some other legal authority separate from the General Allotment Act:

> The Yakima Nation contends it is not clear whether the parcels at issue in this case were patented under the General Allotment Act, rather than under some other statutes in force prior to the Indian Reorganization Act. E.g., 25 USC §§ 320, 379, 404, 405. *We leave for resolution on remand that factual point, and the prior legal question whether it makes any difference.*

502 U.S. at 270 (emphasis added).

In *Lummi Indian Tribe v. Whatcom County, Washington*, 5 F.3d 1355 (9th Cir. 1993), the United States Court of Appeals for the Ninth Circuit addressed that unresolved

[1] 24 Stat. 388, (February 8, 1887), now codified, as amended, at 25 U.S.C. § 331 *et seq.*

question and concluded that the analysis and decision in *Yakima* compelled the same result as to lands that had been allotted by treaty. This Court subsequently denied certiorari in that case. ___ U.S. ___; 114 S. Ct. 2727; 129 L. Ed. 2d 850 (1994).

In the instant case, the Sixth Circuit has now disagreed with the Ninth Circuit. Explicitly rejecting their sister Circuit's decision in *Lummi*, the court below has held that, when an Indian tribe or its members purchase formerly allotted lands located within the boundary of the reservation, those lands become exempt from state property taxes, even where those lands had previously been allotted by treaty, removed from trust, and sold to non-Indians and, thus, have long been subject to state *ad valorem* property taxes.

The Sixth Circuit's decision contravenes the analysis used and the result reached by this Court in *Yakima* and, as the panel itself acknowledges, 106 F.3d at 134 (App. to Pet. 7a), also creates a clear and direct conflict between the Sixth Circuit and the Ninth Circuit on this important issue.[2] The issue posed by this case is significant, affecting the relative taxing authority of states and tribes; the resulting conflict between circuits will lead to confusion and inconsistent rules across the country. We therefore urge this Court to grant certiorari to review this issue.

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[2]Subsequent to the decision by the Sixth Circuit in the instant case, a divided panel of the Eighth Circuit addressed the same issue and, like the Sixth Circuit, rejected the holding in *Lummi*, finding that such lands were exempt from state *ad valorem* property taxation. *See, Leech Lake Band of Chippewa Indians v. Cass County, Minnesota*, 108 F.3d 820 (8th Cir. 1997), reversing the decision of the District Court Judge in *Leech Lake Band of Chippewa Indians v. Cass County, Minnesota*, 908 F. Supp. 689 (D Minn. 1995). We are informed that the Defendants in that case will likewise be filing a Petition for a Writ of Certiorari asking this Court to review that determination.

II. Facts

In 1987, the Saginaw Chippewa Indian Tribe purchased a small parcel of land in Union Township, Isabella County, Michigan from a non-Indian. The Tribe acquired the parcel, and continues to hold it, in unrestricted fee simple absolute; the parcel has not been placed in federal trust status. The Tribe's purchase resulted in a dispute over the imposition of state *ad valorem* property taxes upon that parcel of land, a dispute which eventually led to the filing of the present lawsuit. The United States and the Tribe have maintained that (1) the parcel of land in question is located within the jurisdictional boundary of the Tribe's Reservation, and (2) all such lands owned by the Tribe or by individual tribal members, if located within the Reservation, are exempt from state property taxes. The Defendants, consisting of the State, certain state officials, and various local units of government, have asserted that (1) the Tribe's Reservation is substantially smaller than is claimed by the United States and the Tribe and does not include the property in question, and (2) even within the Reservation, unrestricted (i.e., non-trust) fee lands owned by the Tribe or its members are subject to state property taxes under the decision of the United States Supreme Court in *Yakima, supra*. The District Court ultimately found it unnecessary to resolve the Reservation boundary issue. Instead, the Court ruled that unrestricted fee lands owned by the Tribe are subject to Michigan's property tax even if they are located within the jurisdictional boundary of the Reservation. The Sixth Circuit Court of Appeals has now reversed that determination.

1. Historical Background.

The lands which Plaintiffs claim as the present day Isabella Federal Indian Reservation were initially withdrawn from sale by Executive Order on May 14, 1855 (reprinted in 1 Kappler 846-47) and were subsequently set aside for the benefit of the Saginaw Chippewa by two treaties entered into in 1855 and 1864.

In Article 1 of the 1855 Treaty, 11 Stat. 633, the United States agreed to "withdraw from sale for the benefit of ... [the Saginaw Chippewa] Indians, as herein provided,

all the *unsold public lands* within the State of Michigan embraced within ... [s]ix adjoining townships of land in the county of Isabella, to be selected by said Indians ...." (Emphasis added.) Article 1 of the Treaty went on to provide that, from these withdrawn lands, the United States would "give" a 40- or 80-acre parcel to each individual Indian who fell within certain specified classes of persons, and that the transfer of these lands would be subject to the "same rules and regulations, in every respect, as are provided by the agreement concluded on the 31st day of July, A.D. 1855, with the Ottawas and Chippewas of Michigan [11 Stat. 621], for the selection of their lands." Pursuant to those rules and regulations, the lands allotted to individual Saginaws were to be subject to restrictions upon alienation for a period of ten years; at the expiration of that ten-year period, "such restriction on the power of sale shall be withdrawn, and a patent shall be issued in the usual form ... ." *See, Saginaw Chippewa Indian Tribe v. United States,* Docket 13-H, 2 Ind. Cl. Com. 380, at 382-384 (1953), quoting article 1 of the July 31, 1855 Treaty with the Ottawas and Chippewas, 11 Stat. 621.

Under Article 1, and the rules and regulations which it incorporated, individual Saginaws were to have a period of five years within which to select the parcels to which they each were entitled. "This privilege expired about July 1, 1861." *Saginaw Chippewa Indian Tribe v. United States,* Docket 13-H, 3 Ind. Cl. Com. 1, at 6 (1954). Thereafter, for a second five-year period, individual Saginaws had the exclusive right to purchase additional parcels if they wished to do so. *Id.* At the conclusion of this second five-year period, the treaty provided that "all lands remaining unappropriated by or unsold to the Indians ... may be sold or disposed of by the United States as in the case of all other public lands." *See,* 2 Ind. Cl. Com. 380, at 382-384

(1953).[3]

Under the 1855 Treaty, a second reservation had also been set aside for the Saginaws to the east, on Saginaw Bay. The Saginaws became dissatisfied with the latter reservation and, in 1864, shortly before the second five-year period was to have expired, initiated discussions which resulted in an additional treaty, the Treaty of October 18, 1864, 14 Stat. 657. *See*, 2 Ind. Cl. Com. at 385. In article 1 of the 1864 Treaty, the Saginaws agreed to surrender their rights to the Saginaw Bay reservation. In return, in article 2 of the Treaty, the United States agreed to set apart for the Saginaws all of the remaining unsold lands in the six townships at Isabella, and to permit certain classes of Saginaws to make individual selections from those unsold lands until the remaining lands had been fully selected. 2 Ind. Cl. Com. 380, 386.

Like the 1855 Treaty before it, the 1864 Treaty contained provisions imposing restrictions upon the alienation of allotted lands. The restriction mechanism differed somewhat, however. Under article 3 of the 1864 Treaty, the Saginaws were to be divided into two classes. Those considered "competent" were to receive unrestricted patents in fee simple; those considered "not so competent" would instead receive restricted patents which prevented the land from being "sold or alienated to any person or persons whomsoever, without the consent of the Secretary of the Interior for the time being."

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[3]The 1855 Treaty also contained a provision calling for the dissolution of the tribe. Article 6 of the 1855 Treaty provided that "the tribal organization of [the Saginaw Chippewa] Indians, except so far as may be necessary for the purpose of carrying into effect the provisions of this agreement, is hereby *dissolved*." (Emphasis added.) In light of the various duties and obligations created by other terms of the Treaty, this process would have been gradual and was expected to be completed by approximately 1865. *See, United States v. Holiday*, 70 U.S. (3 Wall) 407, 418-419 (1865). In spite of this provision, the Commissioner of Indian Affairs permitted the descendents of the Saginaws to organize a new tribal government in 1937 under the provisions of the Indian Reorganization Act, 25 U.S.C. § 461 *et seq*. While the parties disagreed forcefully as to the significance of these facts and what effect, if any, they may have upon the nature and scope of the Tribe's modern day reservation boundaries, all parties (other than the City of Mt. Pleasant) were generally in agreement that the Tribe does exist today by virtue of its 1937 federally approved constitution.

2. **The Present Dispute.**

The parcel of land at issue in this case was originally allotted to James Gruette, a Saginaw Chippewa Indian, pursuant to the above treaties, but had subsequently been sold to and had been owned by a succession of non-Indian owners. While owned by non-Indians, the parcel had been regularly assessed under Michigan law for *ad valorem* real property taxes, which had been paid by the owners. In April of 1987, the Tribe purchased the parcel from a non-Indian owner. Through this purchase, the Tribe acquired and continues to hold the unrestricted fee simple title to the property; the property has not been placed in federal trust status.

After acquiring the property, the Tribe asserted that by virtue of its ownership, the property had become exempt from state property taxes. Union Township and the Isabella County, within which the parcel is located, insisted that the property remained subject to taxation. Although the Tribe paid the 1987 assessment in the amount of $1,449.37, the Tribe refused to make further payments and, moreover, demanded a refund of its earlier payment. The County and the Township declined to issue a refund and continued to assess property taxes. This impasse led to the issuance of delinquency notices for 1988, 1989, and 1990 and, eventually, the issuance of a notice of tax sale for the property.

3. **Proceedings Below.**

This case was filed in April of 1991 by the United States, in its own right and on behalf of the Saginaw Chippewa Indian Tribe, seeking injunctive and declaratory relief, as well as a refund of the 1987 property taxes paid by the Tribe. Although the initial dispute had concerned only the tax status of the specific parcel of land purchased by the Tribe in Union Township, the Complaint filed by the United States sought declaratory relief not only as to that parcel, but as to *all* tribally owned property located within the area which the United States claimed as the Tribe's reservation under the Treaties of 1855 and 1864. On October 18, 1991, the United States filed its First Amended Complaint,

expanding its original claim by asserting an exemption from state property taxes not only for *tribally* owned property, but also for property owned by *individual* tribal members.

In January of 1992 the Tribe intervened as a Plaintiff. In its Complaint, the Tribe adopted and asserted each of the tax exemption claims previously pleaded by the United States. In addition, however, the Tribe explicitly sought a declaratory ruling as to the jurisdictional boundaries of the Isabella Reservation, asking the Court to declare that the Reservation includes *all* of the lands within the four townships and two fractional townships described in the 1855 and 1864 Treaties.

While a number of defenses were asserted by various Defendants, by the close of discovery the case had narrowed to essentially two substantial issues which the parties asked the District Court to resolve: (1) the jurisdictional boundary of the present-day Isabella Federal Indian Reservation; and (2) whether fee simple lands owned by the Tribe or its members, located within that boundary, are subject to state *ad valorem* property taxes. The District Court initially determined that it would bifurcate these two issues and instructed the parties to brief and argue the jurisdictional boundary issue first. Cross-motions for summary judgment on this issue were filed by all parties in April of 1994. Following exchange of response and reply briefs, oral argument was held on August 18, 1993. Thereafter, by Order dated June 17, 1994, the District Court directed the parties to file supplemental briefs addressing the taxation issue. Following the submission of the requested supplemental briefs, the Court heard oral argument on November 8, 1994.

On March 23, 1995, the Court issued its Opinion and Order (1) declining to reach the boundary issue and (2) declaring that tribally owned unrestricted fee lands are subject to state property taxes even if located within the boundaries of the Tribe's reservation. The Tribe filed a timely Motion to Alter or Amend the Opinion and Order; this motion was granted as to the correction of a typographical error but was otherwise denied.

The United States and the Tribe each filed a timely appeal. On January 22, 1997, the Sixth Circuit issued its opinion, reversing the District Court and holding that the land in question is exempt from state property taxes. A timely Petition for Rehearing En Banc was filed and was denied by Order of the Sixth Circuit dated March 31, 1997. This Petition for Certiorari is filed within 90 days of that March 31, 1997, Order.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW CONCERNING TRIBAL PROPERTY AND STATE AND LOCAL GOVERNMENT TAXATION AUTHORITY WHICH WAS EXPRESSLY LEFT OPEN IN *COUNTY OF YAKIMA v. CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION*, 502 U.S. 251 (1992).

"Indian tribes and individuals generally are exempt from state taxation within their own territory." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1984). However, as the Supreme Court went on to recognize in that same decision, Congress clearly does possess the authority to permit the imposition of state taxes upon Indian tribes and individuals:

> In keeping with its plenary authority over Indian affairs, *Congress can authorize the imposition of state taxes on Indian tribes and individual Indians*. It has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear.

471 U.S. at 765 (emphasis added). The issue in such cases, then, is whether Congress has granted such authority to the states.

The most important modern decision on the application of this principle to the area of state *ad valorem* property taxes is *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992). In *Yakima*, this Court was confronted with the question of whether the County of Yakima, Washington, could impose its *ad valorem* property tax upon lands allotted under the General Allotment Act where those lands were now owned in unrestricted fee simple by the Yakima tribe or by its members. Although the Court expressly recognized and reaffirmed the rule that courts will decline to find that Congress has authorized state taxation of Indians within a reservation unless it has "made its intention to do so unmistakably clear," 502 U.S. at 258, the Court concluded that Congress had in fact provided such authorization by means of section 5 of the General Allotment Act. The General Allotment Act provided for the allotment of Indian lands throughout the United States and, in section 5, further provided that:

> upon approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefore in the name of the allottees, which patents shall ... declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made ... and that *at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever* ... .

24 Stat. 388, 389 (1887) (emphasis added). Relying upon this statutory provision, and upon its own earlier decision in *Goudy v. Meath*, 203 U.S. 146 (1906), the *Yakima* Court concluded that:

> when § 5 [of the General Allotment Act] rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes.

Yakima, 502 U.S. at 263-264.

Congress later "made this implication of § 5 more explicit, and its nature more clear," the Court observed, in 1906 when it passed the Burke Act, 34 Stat. 182 (May 8, 1906), which amended § 5 of the Dawes Act by adding language making it clear that, following the issuance to the allottee of an unrestricted fee patent, "*all restrictions as to* sale, incumbrance, or *taxation of said land shall be removed.*" *See*, 25 U.S.C. § 349. This new language, the Court observed, "reaffirmed" the conclusion that section 5 of the General Allotment Act was intended to permit the imposition of state property taxes upon such unrestricted fee lands. *Yakima*, 502 U.S. at 264. In the instant case, the Court of Appeals misinterpreted this Court's decision in *Yakima* when it concluded that "lands conveyed under the General Allotment Act are subject to state *ad valorem* property taxes *only because* of the explicit language of the *Burke* Amendment ... ." 106 F.3d at 133-4, App. to Pet. 7a (emphasis added).

The question presented to the Court in *Yakima* was limited by the record to lands which were patented specifically under the provisions of the General Allotment Act. At the close of the majority opinion, the Court noted that the Yakima Nation had suggested that it was not clear whether the parcels at issue were patented under that Act or under some other statutes. The Court declined to address that issue, advising that it would "leave for resolution on remand that factual point, and the prior legal question whether it makes any difference." 502 U.S. at 270. This left open the question of the taxable status of lands, such as those at issue in the present case, which were allotted and patented pursuant to treaty provisions. *But see, Goudy v. Meath, infra,* at 14-15.

II.

THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE DECISION IN *LUMMI INDIAN TRIBE v. WHATCOM COUNTY, WASHINGTON*, 5 F.3d 1355 (9th Cir. 1993), *cert den* __U.S. __; 114 S. Ct. 2727; 129 L. Ed. 2d 850 (1994).

The question left unresolved in *Yakima* was subsequently addressed by the Ninth Circuit Court of Appeals in *Lummi Indian Tribe v. Whatcom County, Washington*, 5 F.3d 1355 (9th Cir. 1993), *cert den*, ___ U.S. ___; 114 S. C.t 2727; 129 L. Ed. 2d 850. Like the present case, *Lummi* involved Indian-owned fee lands that had been allotted and patented, not under the General Allotment Act, but under the provisions of a treaty. The Ninth Circuit carefully examined the Supreme Court's opinion in *Yakima* and concluded that the analysis utilized by the Court and, in particular, the Court's reliance upon and reaffirmation of its earlier decision in *Goudy v. Meath*, 203 U.S. 146 (1906), made "virtually inescapable" the conclusion that the result in *Yakima* must be extended to lands allotted by treaty. *Lummi*, 5 F.3d at 1358.

It is difficult to see how the *Lummi* Court could have reached any other decision, particularly in light of the *Yakima* Court's reaffirmation of its 1906 decision in *Goudy v. Meath*. The lands at issue in *Goudy*, like those in both *Lummi* and in the present case, had been patented pursuant to treaty provisions rather than under the provisions of the General Allotment Act and had initially been protected by restrictions against alienation. *Goudy*, at 146-147. Relying upon the provisions of the General Allotment Act, this Court in *Goudy* held that, upon the lifting of the restrictions upon alienation and the issuance of a fee patent, the lands became subject to property taxes. The Court further concluded that the treaty language which authorized the eventual lifting of restrictions upon alienation for allotted lands was clearly intended to encompass "involuntary as well as voluntary

alienation."[4] *Id.*, at 149-150. *Goudy*, accordingly, unequivocally stands for the proposition that, after federal restrictions upon alienation are removed, unrestricted Indian fee lands become subject to state taxation. *See also, Pennock v. Board of County Commissioners of Franklin County*, 103 U.S. 44, 48 (1881).

The result reached by this Court in *Goudy* and by the Ninth Circuit in *Lummi* is consistent with the provisions of the General Allotment Act itself. Section 1 of that Act, for example, provided, in pertinent part, that:

> in *all cases* where any tribe or band of Indians *has been, or shall hereafter be,* located upon any reservation created for their use, *either by treaty stipulation or by virtue of an act of Congress or executive order* setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof is advantageous for agricultural and grazing purposes, to ... allot the lands in said reservation... .
>
> * * *
>
> *Provided* ... That *where the treaty* or act of Congress setting apart such reservation *provides for the allotment of lands* in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act ... .

24 Stat. 388 (emphasis added). Substantially identical language is retained in the present day version of this act. *See*, 25 U.S.C. § 331.

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[4]Similar language appears in both the 1855 and 1864 Treaties with the Saginaw Chippewa. *See* pp 16-18, *infra*.

The first portion of this passage makes it clear that the General Allotment Act was intended to apply to *all* reservations, whether created by treaty, by statute, or by executive order. More importantly, the second portion clearly demonstrates the intent of Congress that the substantive provisions of the Act, including those directly affecting the alienation of allotments, would apply to allotments made by treaty as well as those made by statute *except* in one specific respect: if the treaty provides for a greater *quantity* of land in each allotment, Congress specified that the treaty provision would control. No other exceptions are authorized by section 1. It follows that the language of the General Allotment Act pertaining to alienation of lands, relied upon by the Court in *Yakima*, was intended by Congress to apply to treaty allotments as well as to allotments made under the Act.

The taxation of the unrestricted Indian fee lands within the Isabella Reservation at issue in the present case is also consistent with the provisions of the 1855 and 1864 Treaties that provided for the original allotment of those lands.

Pursuant to Article 1 of the Treaty of August 2, 1855, 11 Stat. 633, the United States agreed to withdraw from sale "all the unsold public lands" within six adjoining townships in Isabella County and to "give each of the said Indians" a forty- or eighty-acre parcel. These parcels were to "be selected and located ... under the same rules and regulations, in every respect, as are provided by the agreement concluded on the 31st day of July, A.D. 1855, with the Ottawas and Chippewas of Michigan, for the selection of their lands."

The "rules and regulations" referred to and incorporated into the 1855 Treaty are set forth in article 1 of the July 31, 1855 Treaty with the Ottawas and Chippewas, 11 Stat. 621. Those rules and regulations included the following:

> After selections are made, as herein provided, the persons entitled to the land may take immediate possession thereof, and the United States will thenceforth and until the issuing of patents as hereinafter provided, hold the same in trust for such persons, and

> certificates shall be issued in a suitable form guaranteeing and securing to the holders their possession and an ultimate title to the land. But *such certificates shall not be assignable and shall contain a clause expressly prohibiting the sale or transfer by the holder of the land* described therein.
>
> *After the expiration of ten years, such restriction on the power of sale shall be withdrawn, and a patent shall be issued in the usual form,* to each original holder of a certificate for the land described therein, provided that the restriction shall cease only upon the actual issuing of the patent; and provided further that the President may in his discretion at any time in individual cases on the recommendation of the Indian agent when it shall appear prudent and for the welfare of any holder of a certificate, direct a patent to be issued. ... And provided also, that after the expiration of ten years, if individual cases shall be reported to the President by the Indian agent, of persons who may then be incapable of managing their own affairs from any reason whatever, he may direct the patents in such cases to be withheld, and the restrictions provided by the certificate, continued so long as he may deem necessary and proper.

(Emphasis added.)

A modified version of these provisions was incorporated into the subsequent October 18, 1864, Treaty with the Saginaw, 14 Stat. 657, and applied to land selections made under the latter treaty. Article 3 of the 1864 Treaty provided, in pertinent part:

> The United States agrees to issue patents to all persons entitled to selections under this treaty, as follows, viz: To those belonging to the class denominated "competents," *patents*

> *shall be issued in fee simple*, but to those belonging to the class of "those not so competent," the patent shall contain a provision that *the land shall never be sold or alienated* to any person or person whomsoever, *without the consent of the Secretary of the Interior for the time being*. [Emphasis added.]

These provisions are strikingly similar to the language of section 5 of the General Allotment Act relied upon by the Supreme Court in *Yakima*; both the treaties and the Act clearly contemplate an initial period of restriction and protection, to be followed by the issuance of an unrestricted patent with full power of alienation. During that initial period, while the patent was subject to restrictions against alienation, the property was not subject to state property taxation. *See, Auditor General v. Williams*, 94 Mich. 180; 53 N.W. 1097 (1892). Once the restrictions were removed, however, it clearly was contemplated that the land would become fully alienable and, hence, subject to state property taxes. As the Court in *Yakima* observed, quoting its earlier opinion in *Goudy*:

> although it was certainly possible for Congress to "grant the power of voluntary sale, while withholding the land from taxation or forced alienation," such an intent would not be presumed unless it was "clearly manifested." *Ibid* [*Goudy*, at 149]. For "it would seem strange to withdraw [the] protection [of the restriction on alienation] and permit the Indian to dispose of his lands as he pleases, while at the same time releasing it [sic] from taxation." *Ibid*. ...

Yakima, 502 U.S. at 263. *See also, Lummi*, 5 F.3d at 1358.

The Court of Appeals simply dismissed these points. In doing so, the Court effectively rejected the analysis adopted by this Court in *Yakima* and created a direct conflict with the decision of the Ninth Circuit in *Lummi, supra*.

CONCLUSION

For these reasons, Petitioners ask this Court to grant certiorari to resolve the conflict between the circuit courts of appeal and to resolve this important dispute concerning Tribal property and state and local government taxation authority.

Respectfully submitted,

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June, 1997

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Nos. 95-1574/95-1575

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, ON BEHALF OF THE SAGINAW CHIPPEWA INDIAN TRIBE,	)	
Plaintiff-Appellant (95-1575),	)	ORDER
SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN,	)	
Intervenor-Appellant (95-1574),	)	
v.	)	
STATE OF MICHIGAN, ET AL.,	)	
Defendants-Appellees.	)	

March 31, 1997, FILED

BEFORE: MERRITT, JONES, and COLE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

Nos. 95-1574/95-1575

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
on behalf of the Saginaw Chippewa
Indian Tribe,

Plaintiff-Appellant (95-1575),

SAGINAW CHIPPEWA INDIAN
TRIBE OF MICHIGAN,

Intervenor-Appellant (95-1574),

ON APPEAL from the United States District Court for the Eastern District of Michigan

v.

STATE OF MICHIGAN, et al.,

Defendants-Appellees.

Decided and Filed January 22, 1997

Before: MERRITT, JONES, and COLE, Circuit Judges.

MERRITT, Circuit Judge. The Department of Justice brought this action on behalf of an Indian Tribe and individual Indian property owners against the State of [2] Michigan and various political subdivisions of Michigan that have assessed *ad valorem* property taxes on Indian-owned lands. The case raises the question of whether certain parcels of land in Michigan west of Saginaw Bay that are owned by the Saginaw Chippewa Indian Tribe and by members of the Tribe are subject to *ad valorem* property taxes. The Supreme Court has clearly stated the rule in such cases as follows: "'[A]bsent cession of jurisdiction or other federal statutes permitting it,' . . . a State is without power to tax reservation lands and reservation Indians." *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 258 (1992) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)). Congress is not deemed to have authorized state taxation unless it has

"made its intention to do so unmistakably clear." *Yakima* at 258 (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985)). Thus we must determine whether Congress has expressed an "unmistakably clear" intention to authorize state taxation of the land at issue. We find that Congress has not shown such an "unmistakably clear" intent. Therefore we REVERSE the district court's grant of summary judgment to Michigan and the county and township defendants. We REMAND the case, however, for resolution of the defendants' claims that the land at issue is not reservation land and that the Saginaw Chippewa Tribe has been dissolved. Those claims have not yet been adjudicated and we express no opinion on them.

* * *

By treaty dated August 2, 1855, the United States agreed to give to the Saginaw, Swan Creek, and Black River Chippewas certain land that was publicly-owned at that time -- including the parcels of land at issue in this suit. The United States agreed to "patent" or "allot," *i.e.* convey, tracts of the land to individual Chippewa Indians. Treaty with the Chippewas, Aug. 2, 1855, art. 1, 11 Stat. 633. In 1864, the same parties signed a new treaty that contained new allotment provisions. Treaty with the [3] Chippewa Indians, Oct. 18, 1864, 14 Stat. 657. The 1864 treaty also altered the lands set aside for the Chippewas. Under the 1855 treaty, the United States had agreed to withdraw from sale all unsold public lands within six townships in Isabella County and six townships adjacent to Saginaw Bay. In the 1864 treaty, the Chippewas conveyed the Saginaw Bay land back to the United States in exchange for the United States' agreement to set apart the unsold lands in the six townships in Isabella County "for the exclusive use, ownership, and occupancy" of the Chippewas. *Id.*

The United States conveyed each of the parcels of land at issue in this case to individual Chippewa Indian owners under the terms of the 1864 treaty. Each of the parcels then went through a chain of owners that included at least one non-Indian owner. Each parcel, however, was subsequently purchased by either the Saginaw Chippewa Indian Tribe or by a member of the Tribe. After the Tribe

and the individual Indian owners had purchased the parcels, the county and township defendants continued to assess *ad valorem* property taxes on the parcels, as they had during the periods of non-Indian ownership.

The United States and the Tribe seek declaratory and injunctive relief as well as reimbursement of property taxes that the Tribe paid. They claim that the defendants lack jurisdiction to assess *ad valorem* property taxes on the land at issue because the land is owned by Indians within Indian Country. The district court granted summary judgment for the defendants, finding that when Congress conveyed the land to individual Indian owners in unrestricted fee simple pursuant to the 1864 treaty, Congress intended to give the state the authority to tax the land.

We are faced solely with the legal question of whether Michigan and its political subdivisions have the power to assess *ad valorem* property taxes on the property at issue. Neither the 1864 treaty nor the 1855 treaty mentions taxation explicitly. Under both treaties, however, land that [4] the United States conveyed to individual Indian owners became alienable without any restrictions. The defendants follow the familiar model of contemporary legal argument by taking out of context a snippet of language from a Supreme Court opinion and manipulating it to reach a chosen result. They seize on language from *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), and erroneously argue that the free alienability of this land in the hands of these Indians in and of itself makes the land subject to state property taxation.

The defendants base their interpretation of *Yakima* primarily on the Court's statement, made during its discussion of an earlier case, that "when § 5 [of the Indian General Allotment Act of 1887] rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes." *Yakima* at 263-64. When read out of context, this statement seems to support the defendants' claim that any congressional act making Indian land alienable is sufficient to show a clear intention to make the land subject to property taxes. Within the context

of the *Yakima* opinion, however, this statement was merely part of an explanation of "the structure of the General Allotment Act," *id.* at 262, 263.

The General Allotment Act of 1887, the legislation interpreted in *Yakima*, provided for conveyance of certain land to individual Indian owners. Under the Act, the United States was to hold each parcel in trust for twenty-five years, after which it was to convey the land in fee to its Indian owner. As originally enacted, the Act did not explicitly discuss whether or not the land conveyed would be subject to state property tax. In 1906, however, Congress enacted the Burke Act, which amended Section 6 of the General Allotment Act and made clear that land conveyed in fee under the Act would be subject to *ad valorem* taxation. The Burke Act provided that after such a conveyance "all restrictions as to sale, incumbrance, *or* [5] *taxation* of said land shall be removed." 25 U.S.C. § 349 (emphasis added).

Section 6, now codified as 25 U.S.C. § 349, reads as follows (the Burke Act having added the provisos):

> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and *thereafter* all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall be

> issued shall be subject to the exclusive jurisdiction of the United States: *And provided further,* That the provisions of this Act shall not extend to any Indians in the former Indian Territory.

(second emphasis added). The defendants' argument that the *Yakima* Court could not have relied on this section's explicit taxation language because that language applies only to lands conveyed to "competent" Indians prior to the expiration of the trust period is error. The *Yakima* Court relied on this explicit taxation language throughout its opinion, including the portion of the opinion dealing with excise taxes (discussed below), without differentiating between lands conveyed early to "competent" Indians and [6] lands conveyed after the trust period expired. The Court thus implicitly read the word "thereafter" to apply to both the "expiration of the trust period" and the issuance of a fee simple patent to a "competent" Indian. Indeed, this is the only reasonable interpretation of the statute. As a policy matter, it makes no sense to treat the two types of land differently for purposes of taxability -- especially more than one hundred years after the initial conveyances were made.

Michigan argues that alienability necessarily implies taxability as a general proposition, instead of recognizing that the language of the proviso quoted above in the General Allotment Act Congress expressly tied the two together only for purposes of the Indian lands covered in that Act. In *Yakima*, the Supreme Court held that "by specifically mentioning immunity from land taxation as one of the restrictions that would be removed upon conveyance in fee, Congress in the Burke Act proviso manifested a clear intention to permit the state to tax such Indian lands." *Yakima*, 502 U.S. at 259 (internal quotation marks omitted). Thus, the *Yakima* decision, properly interpreted, does not alter the general rule requiring an "unmistakably clear" expression by Congress to allow state taxation of Indian land. Congress has taken no such action with respect to the Indian lands in the instant case.

The *Yakima* opinion demonstrates that a treaty provision that makes Indian land fully alienable does not, by itself, rise to the level of "unmistakably clear" congressional

intent to give states the authority to tax such alienable Indian lands. Alienability does not alone imply taxability. In addition to holding that lands conveyed under the General Allotment Act are subject to state *ad valorem* property taxes only because of the explicit language of the Burke Amendment, the *Yakima* Court held that the Act does not authorize state excise taxes on the sale of such land. The implication that land becomes subject to excise sales taxes follows just as strongly from congressional action making the land alienable as the implication that the [7] land becomes subject to *ad valorem* property taxes. Rather than relying on this implication, however, the Court barred excise taxation of land transfers, concluding that "[t]he short of the matter is that the General Allotment Act explicitly authorizes only 'taxation of . . . land,' not 'taxation with respect to land,' 'taxation of transactions involving land,' or 'taxation based on the value of land.'" *Id.* at 269.

The defendants argue that in *Goudy v. Meath*, 203 U.S. 146 (1906), when faced with a treaty similar to the one in this case that did not explicitly permit taxation, the Supreme Court appears to have held that alienability is tantamount to taxability. As the Ninth Circuit has recognized, however, "[t]his proposition may be hard to square with the requirement, recently approved by the *Yakima Nation* Court, that Congress' intent to authorize state taxation of Indians must be unmistakably clear." *Lummi Indian Tribe v. Whatcom County, Washington*, 5 F.3d 1355, 1358 (9th Cir. 1993). We believe that this doubt by the *Lummi* court is superior to its ultimate holding that alienability implies taxability. The *Yakima* Court chose not to follow *Goudy's* holding with respect to the taxability of treaty lands. The Ninth Circuit improperly relied on the 1906 *Goudy* decision, instead of following *Yakima*.

The *Lummi* court's holding that alienability implies taxability would have much to commend it, and we would subscribe to it, if we were writing on a clean slate. It is not very satisfying as a policy matter to treat lands that were initially conveyed over 100 years ago differently for tax purposes depending on whether they were conveyed under the General Allotment Act or some other treaty. In *Yakima*, however, the Supreme Court reaffirmed and instructed us

that such policy decisions are not for the courts to make. Rather than finding that alienable Indian lands are subject to excise taxes on the general policy grounds that the defendants advocate, the Court carefully parsed the language of the General Allotment Act to [8] determine whether or not Congress expressed an unmistakably clear intention to subject the land to such taxes. We must follow this example even though it leads to an unsatisfactory result in terms of wise policy.

The defendants' reliance on *Pennock v. Commissioners*, 103 U.S. 44 (1880) is also misplaced. In *Pennock*, the Supreme Court held that the state of Kansas had authority to tax land that had been conveyed to an Indian in fee simple. The plaintiff in *Pennock*, however, had remained behind in Kansas when her tribe and its reservation lands moved to a different state. *Pennock* stands only for the proposition that states have the authority to tax an Indian's lands that are not located within Indian Country. *See id.* at 48 ("[The plaintiff's] subsequent relation to her tribe, as a member of it . . . cannot affect the jurisdiction of the State over her property for governmental purposes. She might have followed her tribe . . . but as that tribe . . . has left the State, while she remains, and has taken . . . a title carrying with it absolute ownership, with a right of free disposition at her will, she and her property have come under the control of the State . . . .").

Congressional action making Indian land alienable does not, by itself, show an "unmistakably clear" intention to authorize states to tax the land. Unlike the General Allotment Act, the treaties in this case do not demonstrate such congressional intent. Nor have the defendants presented any other evidence showing such an intent. Therefore, Congress has not made the land at issue subject to state property taxes, and the defendants lack authority to impose such taxes.

The defendants also argue that even if the treaty of 1864 did not authorize state property taxes, the provisions of the General Allotment Act, particularly Section 6, apply to land conveyed under prior treaties and authorize the taxes at issue. The defendants rely exclusively on two

passages from Section 1 of the General Allotment Act: [9]

> in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof is advantageous for agricultural and grazing purposes, to . . . allot the lands in said reservation . . . .
>
> . . . .
>
> Provided . . . That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act . . . .

24 Stat. 388; *codified with amendments at* 25 U.S.C. § 331.

The defendants claim that the first of these passages "makes it clear that the General Allotment Act was to apply generally to *all* reservations, whether created by treaty, by statute, ~~or by~~ executive order." This claim is undeniably true, but it does not follow that the substantive provisions of the Act were intended to apply to all grants of land under any treaty. Rather, the General Allotment Act provides an additional mechanism by which the President can allocate reservation lands to individual Indians. This allocation is limited to lands that are "advantageous for agricultural and grazing purposes." Until the President exercises the authority delegated in the Act, Section 6 allowing *ad valorem* taxation is not triggered. Nothing in either the language cited by the defendants or the remainder of the Act suggests that Congress intended either to bar allocations pursuant to pre-existing treaties or to alter the substantive rights of Indian owners of property that was [10] allocated before Congress enacted the General Allotment Act. *See United States v.*

Kopp, 110 F. 160, 165-66 (D. Wash. 1901) (rejecting claim that Indian who received land pursuant to an 1854 treaty was subject to the trust provisions of the General Allotment Act).

The second passage that the defendants cite is equally unavailing. The defendants claim that the passage "clearly demonstrates the intent of Congress that the substantive provisions of the Act . . . would apply to allotments made by treaty as well as those made by statute, except in one circumstance" as specified in the statute. The quoted proviso, however, serves only to define the scope of the President's power to allot lands under the Act. Nothing in that passage indicates that the General Allotment Act provisions govern land grants that are not made pursuant to the Act or that were made before the Act was passed.

For the foregoing reasons, we REVERSE the district court's grant of summary judgment and REMAND for further proceedings, including adjudication of the defendants' claims that the land at issue is not reservation land and that the Saginaw Chippewa Tribe has been dissolved.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,
on behalf of the Saginaw
Chippewa Tribe and its members,

Plaintiff,

SAGINAW CHIPPEWA INDIAN
TRIBE OF MICHIGAN, on its
own behalf and as parens
patriae for its members,

Plaintiff-Intervenor, Case No: 91-CV-10103-BC

v.

STATE OF MICHIGAN, COUNTY
OF ISABELLA, CITY OF MOUNT
PLEASANT, UNION TOWNSHIP,
ISABELLA TOWNSHIP, DENVER
TOWNSHIP, CHIPPEWA TOWNSHIP,
STEVEN PICKENS, and DUANE
SHERWOOD,

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

I. Background

This matter is before the court on cross motions for summary judgment.[1] This controversy arises from the levying of *ad valorem* [2] property taxes by the defendants upon lands owned by individual members of the plaintiff Tribe or collectively by the Tribe itself.[2] On February 10, 1988, the plaintiffs paid $1,449.37 to satisfy 1987 *ad valorem* taxes levied by Isabella County and Union Township. Since 1988, plaintiffs have refused to pay any further *ad valorem* taxes and initiated this suit in 1991 for reimbursement of the $1,449.37 and to enjoin defendants

from further levy of *ad valorem* taxes.

This case has a complex procedural history, only the highlights of which require exposition. Oral argument has twice been held in this matter: first, with regard to the issue of reservation status (i.e., whether a reservation was created and whether, if created, it was diminished) and tribal status (i.e., whether the tribe was dissolved pursuant to the treaty of 1864), and second, with regard to the propriety of levying *ad valorem* property taxes.

Prior to the second oral argument, the court ordered briefing by the parties on the ultimate issue of the propriety of imposing *ad valorem* taxes upon the instant property. In the order, the court noted that "[n]early all the parties agree[3] that the land specifically at issue here originates from that portion of land patented to James Gruette in 1871 pursuant to the treaties of 1855 [3] and 1864, granting to him an unrestricted fee simple absolute estate in land. *See, Pl. First Am. Complaint,* p. 3, ¶ 7; *Def. State of Michigan Answer,* p. 6, ¶ 7; *Def. Township Answer,* p. 3, ¶ 7; *Def. County of Isabella Answer,* p. 3, ¶ 7."

At the second oral argument, held November 8, 1994, the court inquired of each party and was assured of the agreement of the parties that all land involved in this case is unrestricted fee simple land patented pursuant to the treaties of 1855 and 1864.[4]

The relevant treaties reflect the tenor of the times, and called for assimilation of Indians. One step toward this goal was to allot parcels of land to individual Indians. Thus, the treaty of 1855 provided for specific grants of land to various classes of Indians [i.e. head of family, single persons, etc.].

> And the said Chippewas of Saginaw and of Swan Creek and Black River, shall have the same exclusive right to enter lands within the tracts **withdrawn from sale for them for five years after the time limited for selecting the lands to which they are individually entitled, [and the same right to sell and dispose of land entered by them,** under the provisions of the

> Act of Congress known as the Graduation Act], as is extended to the Ottawas and Chippewas by the terms of said agreement.

Article 1, treaty of 1855 (emphasis supplied) (amended portion in []s).

After describing the particular consideration for the agreement, the treaty states: [4]

> **The tribal organization of said Indians, except so far as may be necessary for the purpose of carrying into effect the provisions of this agreement, is hereby dissolved.**

Article 6, treaty of 1855 (emphasis supplied).[5]

The treaty of 1864 then provided a further step toward assimilation by providing for an eventual end to the relationship between Indian allottee as beneficiary and United States as trustee (with the land as the *res*).

> After selections are made, as herein provided, the persons entitled to the land may take immediate possession thereof, and the United States will thenceforth and until the issuing of patents as hereinafter provided, hold the same in trust for such persons, and certificates shall be issued, in a suitable form, guaranteeing and securing to the holders their possession and an ultimate title to the land. **But such certificates shall not be assignable and shall contain a clause expressly prohibiting the sale or transfer by the holder of the land described therein.**
>
> **After the expiration of ten years, such restriction on the power of sale shall be withdrawn, and a patent shall be issued in the usual form to each original holder of a certificate for the land described therein PROVIDED That such restriction shall cease only upon the actual issuing of the patent;** AND PROVIDED FURTHER That the President may in his discretion at any time in individual cases on the recommendation of the Indian agent when it shall

> appear prudent and for the welfare of any holder of a certificate, direct a patent to be issued (emphasis provided).

The scheme under the 1864 treaty required differential treatment of Indians depending on their perceived capabilities.

> So soon as practicable after ratification of this treaty, the agent for said Indians shall make out a list of all those persons who have heretofore made selections of lands under the treaty of August 2d, 1855, aforesaid, and of those who may be entitled to selections under the provisions of this treaty, and he shall divide the [5] persons enumerated in said list into two classes, viz: 'competent' and 'those not so competent.'

Article 3, treaty of 1864.

* * *

> The United States agrees to issue patents to all persons entitled to selections under this treaty, as follows, viz: **To those belonging to the class denominated 'competents,' patents shall be issued in fee simple, but to those belonging to the class of 'those not so competent,' the patent shall contain a provision that the land shall never be sold or alienated to any person or persons whomsoever, without the consent of the Secretary of the Interior for the time being.**

Article 3, treaty of 1864 (emphasis supplied).

Although urged by plaintiffs and defendants alike to address the questions of reservation and tribal status, the court finds that to address these issues would be to create mere dicta. Since the issues of reservation and tribal status do not affect the propriety of the *ad valorem* property taxes levied here, the court declines to address them. This decision is a vexing one in light of the time and effort put forth by the parties in addressing these status issues which appeared more relevant prior to recent case law. The court

appreciates this effort, but perceives a duty to refrain from analysis which exceeds necessity. Accordingly, the related issue of abstention with regard to the issue of tribal status is also beyond the reach of this opinion.6[6]

II. Standard

Summary judgment is proper only where the moving party shows that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). There is no genuine issue of material fact when "the record as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The court is required to ask "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). The party opposing summary judgment must present "affirmative evidence in order to defeat a properly supported motion for summary judgment." *Id.* at 1479, citing *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986).

III. Discussion

A. Jurisdiction

The first issue raised by Defendant State of Michigan in its answer is whether jurisdiction is proper in this federal district court in light of 28 U.S.C. § 1341 which precludes the district court from enjoining, suspending or restraining tax levy or collection where a plain, speedy, and efficient remedy exists in the state courts.[7]

Defendant's argument has been rejected by the United States Supreme Court where either the United States or the Tribe itself brings the action:

> Here the United States could have made the same attack on the State's assertion of taxing power as was in fact made by the Tribe. We think that the legislative history of § 1362, though by no means dispositive,

> suggests that in certain respects tribes suing under this section were to be accorded treatment similar to that of the United States had it sued on their behalf. Since the United States is not barred by § 1341 from seeking to enjoin the enforcement of a state tax law, ... we hold that the Tribe is not barred from doing so here.

Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 474-75 (1976).

Therefore, 28 U.S.C. § 1341 will not bar the instant cause of action and jurisdiction is proper in this federal district court.[7]

B. Merits

> This is another case in which we must 'reconcile the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations.'

Department of Taxation and Finance of New York v. Milhelm Attea & Bros., 512 U.S. __, 114 S.Ct. __, 129 L.Ed.2d 52, 63 (1994). Particularly, the instant case requires the court to determine whether land located within reservation bounds and owned in fee simple absolute by individual Tribe members or the Tribe itself is immune from *ad valorem* property taxation.[8]

Were the owners not Indians, and were the land not located within reservation bounds, the land would undoubtedly be subject to taxation because land owned in fee simple absolute (i.e. "unrestricted," "perfect title") is subject to taxation in the ordinary course. The answer to the question becomes complex only upon factoring in the identity of the owners of the land and the location of the land within reservation bounds. Plaintiffs urge the court to focus only upon the identity of the owners (tribe or tribal members) and the location of the land (within reservation bounds), whereas defendants ask the court to focus on the character of the title to the land (unrestricted fee). The court believes that the two viewpoints can be reconciled, with the status of land title being the more pertinent in determining

the propriety of levying *ad valorem* property taxes upon unrestricted fee-patented land, as here.

1. *In rem* versus *in personam* jurisdiction

Identification of who owns the land and the effect of reservation boundaries are most relevant to *in personam* jurisdictional questions, while the quality of the land title is most relevant to *in rem* jurisdictional questions. Although plaintiffs would prefer that the court not recognize the distinction between *in rem* and *in personam* jurisdiction, the court must follow the United States Supreme Court's express differentiation between the two in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992).[9]

In *County of Yakima v. Confederated Tribes ("Yakima")*, the Yakima Nation challenged the imposition of both *ad valorem* property taxes and excise taxes regarding unrestricted fee-patented land located within the bounds of the Yakima Reservation. After foreclosure proceedings were initiated in 1987, the Tribe commenced an action for declaratory and injunctive relief, contending that federal law prohibited both the *ad valorem* and excise (sales) taxation of these fee-patented lands owned by the Tribe. As more fully described below, the Court in *Yakima* held that state imposition of *ad valorem* property taxes was a proper exercise of the state's *in rem* jurisdiction over fee-patented lands within reservation bounds.

a. The Yakima precept

The Court in *Yakima* asserts that "in the area of state taxation, ... absent cession of jurisdiction or other federal statute permitting it," states are without power to tax "reservation lands and reservations [sic] Indians" absent "unmistakably clear" Congressional intent.[8] *Yakima*, 502 U.S. at 258, *citing Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985), and *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215, n. 17 (1987).[10]

As noted earlier, the land involved in *Yakima* was

unrestricted fee-patented land to which the Court applied the precept and determined that "clear Congressional intent" existed under the General Allotment Act. Application of the *Yakima* precept noted above to this case would therefore rest on the implicit postulate that the lands involved here are "reservation lands." Such, the instant court thinks, is not the case, as will be noted and discussed below at b(iii) and *infra*. In addition, there are two preliminary concerns about the *Yakima* precept that the court believes deserve review at the threshold. These are discussed at (i), the precept's foundation in precedent and, at (ii), whether it is dictum.

(i) Is the *Yakima* precept soundly based in precedent?

The Court in Mescalero formulated the basis for the presumption against taxability cited in *Yakima* and by other, later, Courts. The Court in *Mescalero* noted that "even on reservations state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." *Mescalero*, 411 U.S. at 148. However, the Court then continues:

> [e]ven so, in the special area of taxation, absent cession of jurisdiction or other federal statues permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and McClanahan v Arizona State Tax Comm'n, supra, lays to rest any doubt in this respect by holding that *such taxation is not permissible absent Congressional consent*.[11]

Mescalero, 411 U.S. at 148 (emphasis supplied).

However, in *McClanahan*, decided the same day as *Mescalero* and cited therein, the Court stated that "exemptions from tax should, as a general rule, be clearly expressed." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 176 (1973) (finding Arizona Enabling Act expressly provided exemption), *citing Squire v. Capoeman*, 351 U.S. 1, 6 (1956) (stating that "exemptions to tax laws

should be clearly expressed" and interpreting the treaty and Allotment Act as providing such clear expression of exemption).

Thus, the presumption in *McClanahan* and *Squire* appears to have favored the ability to tax in the absence of clearly expressed Congressional exemption, while *Mescalero* read *McClanahan* and *Squire* as precluding taxation absent specific Congressional consent.

The court further notes that these cases predate the express *in rem* and *in personam* jurisdiction distinction announced in *Yakima* and address what would now be considered *in personam* tax issues. Accordingly, their application to the *ad valorem* property tax issue in *Yakima* and the instant case seems to the court somewhat attenuated. This court's conclusion is that, upon inspection, the *Yakima* precept appears to have been a virtual inversion of precedent.

(ii) Is the *Yakima* precept obiter dictum?

In *Mescalero*, the Court decided the propriety of state taxation imposed on income derived from operation of a ski resort (gross receipts tax) and use tax imposed on the ski lifts [12] themselves. The land upon which the ski resort was operated was not within reservation bounds but was owned by the federal government and leased to the Indians for thirty years through the Forest Service. Thus, the Court decided nothing about the propriety of taxes to be imposed on land within reservation bounds, nor on land which was owned by the federal government and held in trust for the benefit of the Indians, nor even land "set apart" for the use and enjoyment of the Indians.[9] Accordingly, the Court did not decide the propriety of taxation upon reservation Indians or reservation lands. Furthermore, as to the gross receipts tax imposed on the activities of Indians outside reservation bounds, the Court declined to imply an exemption "absent a 'definitely expressed' exemption." *Mescalero*, 411 U.S. at 156.

Obiter dictum is defined as "observations relevant, but not essential, to the determination of the legal questions then before the court." *Dedham Water v. Cumberland Farms*

Dairy, 972 F.2d 453, 459 (1st Cir. 1992). Dictum "constitutes neither the law of the case nor the stuff of binding precedent." *Id.*

The precept derived--that taxation is not permissible absent Congressional consent--though it may be dictum, is oft-cited.[10] [13][14] "Carefully considered statements of the Supreme Court, even if technically dictum, must be accorded great weight and should be treated as authoritative," especially when it is "'of recent vintage and not enfeebled by any subsequent statement.'" *United States v. Santana*, 6 F.3d 1, 9 (1st Cir. 1993), *quoting, McCoy v. Massachusetts Inst. of Technology*, 950 F.2d 13, 19 (1st Cir. 1991). The precept is a considered statement and has been quoted with approval since its genesis. Accordingly, although this court has analyzed its origins, it will nonetheless treat it as authoritative.

In *McClanahan*, the Court did address the issue of whether a reservation Indian's income derived from activities carried on within reservation bounds is tax exempt. As noted earlier, the Court in *McClanahan* stated the need for tax-exemptions to be clearly expressed, and found such express statutory income tax immunity in the Arizona Enabling Act. *McClanahan*, 411 U.S. at 176.[11] Accordingly, the *McClanahan* holding was simply that the Arizona Enabling Act provided income tax immunity for all Indians residing on reservations.[15]

Dictum in *McClanahan*, however, implies that the result would have been the same even absent Congressional tax-exemption. Although the Court in *McClanahan* cites *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965), *Williams v. Lee*, 358 U.S. 217 (1959) and *Kennerly v. District Court*, 400 U.S. 423 (1971), its dictum is an expansion if not an outright departure.

After the citation to *Warren Trading Post* the Court in *McClanahan* states that:

> [t]he tax [in *Warren Trading Post*] in no way interfered with federal land or with the National Government's proprietary interests. But it was invalidated nonethe-

> less because 'from the very first days of our Government, the Federal Government had been permitting the Indians to largely govern themselves, free from state interference.'

McClanahan, 411 U.S. at 164, quoting *Warren Trading Post*.

However, the Court's decision in *Warren Trading Post* had rested upon the idea that state taxation of Indian traders indeed *would* interfere with the federal scheme:

> These apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders.

Warren Trading Post, 380 U.S. at 690.

Such language presaged current recognition of areas which are subject to super-preemption by the federal government such as ERISA and LMRA. *Holman v. Laulo-Rowe Agency*, 994 F.2d 666, 668 (9th Cir. 1993).

Furthermore, the Court in *Warren Trading Post* noted that state taxation would "disturb and disarrange the statutory plan Congress set up in order to protect Indians." *Warren Trading Post*, 380 U.S. [16] at 691. Accordingly, preemption was the primary motivator behind the Court's decision in *Warren Trading Post*; the case does not recognize Indian sovereignty within reservation bounds as an independent barrier to taxation, as the Court in *McClanahan* implies.

Similarly, *Williams v. Lee* held only that "Congress recognized this authority [to govern reservation affairs]...If this power is to be taken away from them, it is for Congress to do it." *Williams v. Lee*, 358 U.S. at 223. Although the case contains language favorable to Indian self-governance throughout the text, it is clear that the battle lines drawn are those of federal government versus state, not Indians versus state.[12]

Accordingly, had express Congressional exemption

from taxation been absent in *McClanahan*, the result would *not* have been the same, contrary to the dictum in *McClanahan*. The convergence of dicta in *Mescalero* and *McClanahan* transforms reservation bounds into an independent jurisdictional barrier to state income taxation of Indians residing there, absent Congressional authority for such [17] taxation. *McClanahan*, 411 U.S. at 164 (where dictum indicated tax immunity for the activities conducted by Indians who reside within reservation bounds, even where the activity was not conducted within such bounds). This metamorphosis moves from dictum into the realm of binding precedent in *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976) (holding cigarette sales tax and personal property tax improperly imposed by state within reservation bounds).

The court thus concludes that, oddly enough, the fundamental language for the *Yakima* precept, created in *Mescalero*, appears to have been dictum. As noted earlier, however, it carries the authoritative weight of precedent and will be treated as such by this court. *Santana*, 6 F.3d at 9.[13]

(iii) Are reservation lands involved?

"Reservation lands" are those lands withheld from the public domain, i.e. land held in trust by the United States for the benefit of Indians. *See, Potawatomi, supra*, 498 U.S. 505 (equating "reservation" with "trust land"). Since the *Yakima* precept--that state taxation is precluded absent express Congressional authority--expressly limits its application to reservation lands, and since the lands herein are not reservation lands, it is inapposite here.[18]

This conclusion is buttressed by the fact that the cases cited in *Yakima* and the cases cited within those cases, involved land held in trust by the United States for the benefit of the Indians. *Mescalero, supra; McClanahan, supra; Squire, supra.* Not one case, prior to *Yakima*, had applied the precept to unrestricted fee patented land within reservation bounds. Previous cases applying such a precept all involved restricted or trust land. *E.g., Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985).

Accordingly, this court must express some degree of doubt about the correctness of applying a substantial precept such as the one in question. However, since the Court in *Yakima* began with it, so it shall be herein.

b. Application of the precept

i. Yakima

In applying the precept to land patented pursuant to the General Allotment Act, the Court in *Yakima* states:

> Although such a fee patent [one after the Burke Act proviso enacted in 1906 which stated that § 6's grant of civil and criminal jurisdiction over Indian allottees would not be effective until the 25 year trust period expired under the General Allotment Act] would not subject its Indian owner to *plenary* state jurisdiction, fee ownership would free the land of 'all restrictions as to sale, incumbrance or taxation.' 25 USC § 349. In other words, the proviso reaffirmed for such 'prematurely' patented land what § 5 of the General Allotment Act implied with respect to patented land generally: subjection to state real estate taxes. And when Congress, in 1934, while putting an end to further allotment of reservation land, see 25 USC § 461, chose *not* to return allotted land to pre-General Allotment Act status, leaving it fully alienable by the allottees, their heirs and assigns, it chose not to terminate state taxation upon those lands as well.[19]

Yakima, 502 U.S. at 264 (internal citations omitted, emphasis in original).

Accordingly, the Court in *Yakima* upheld the state's imposition of *ad valorem* property taxes upon the fee-simple land owned by the tribe and tribal members.

The Court in *Yakima* was not persuaded by the argument that to permit the state to impose *ad valorem* property taxes upon unrestricted, fee-patented land would violate *Moe*'s condemnation of checkerboard jurisdiction within reservation bounds:

> The Yakima Nation and the United States deplore what they consider the impracticable, Moe-condemned 'checkerboard' effect produced by Yakima County's assertion of jurisdiction over reservation fee-patented land. But because the jurisdiction is in rem rather than in personam, it is assuredly not Moe-condemned; and it is not impracticable either. The parcel-by-parcel determinations that the State's tax assessor is required to make on the reservation do not differ significantly from those he must make off the reservation...

Yakima, 502 U.S. at 264-65.

Based on the distinction between *in rem* and *in personam* jurisdiction, the Court in *Yakima* also held that excise taxes on the sale of land could not be imposed. *Id.* The Court noted that excise taxes would intrude upon the self-governance of the tribe because they are imposed on the person, for the person's actions, i.e. they involve *in personam* jurisdiction.[14][20]

Plaintiff United States argues that *Yakima* did not address the question presented here because in *Yakima*, the Court

> determined only that Congress had consented to state taxation of reservation lands patented under authority of the General Allotment Act (GAA), now codified at 25 U.S.C. § 331 et seq. The tax status of lands patented pursuant to other authorities, such as treaties at issue here, was specifically remanded by the Court.

Pl. U.S. Br., pp. 2-3. The plaintiff United States then concludes that since *Yakima* is not on all fours, "the per se rule against state taxation of reservation Indians announced in California v. Cabazon Band of [Mission] Indians, 480 U.S. 202, 215, n. 17 (1987), bars defendants' assertion of taxing jurisdiction over lands owned in fee by the Tribe and its members on the Isabella reservation." *Pl. U.S. Br.*, p. 3; pp. 5-6.

First, the *per se* rule announced in *California v. Cabazon* was limited to "the special area of state taxation of Indian tribes and tribal members." *California v. Cabazon*, 480 U.S. at 215, n. 17 (holding that the state could not tax gambling activities--involving *in personam* jurisdiction--conducted on the reservation). The *"per se"* rule precluding state jurisdiction was not even touted as applying to land owned by tribes. Since *ad valorem* property taxes are not taxes imposed upon Indians, but rather are imposed upon the land itself, the so-called *per se* rule would not apply [21] under its own definition. *California v. Cabazon*, 480 U.S. at 214-215.[15]

As noted by the Court in *Yakima*, "[w]hile in personam jurisdiction over reservation Indians at issue in Moe would have been significantly disruptive of tribal self-government, the mere power to assess and collect a tax on certain real estate is not." *Yakima*, 502 U.S. at 265. Thus, not only does the letter of the *per se* rule remain unscathed by *ad valorem* taxes levied upon the property of tribes, so does the spirit.

More importantly, a subsequent case, *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355, 1357-59 (9th Cir. 1993), is on all fours because it addresses lands patented, not pursuant to the GAA, but rather patented under a treaty similar to the instant treaties of 1855 and 1864.

ii. Lummi

In *Lummi, supra*, the Ninth Circuit interpreted *Yakima* and concluded that if the "land is alienable, it is taxable." In *Lummi*, as here, the land was patented not under the General Allotment Act, but under a treaty. *Id.* The Ninth Circuit found this distinction to be of no import. *Id.*[22]

The court notes initially that equating alienability with taxability in general is not an aberration from precedent. *See, Given v. Wright*, 117 U.S. 648, 652 (1886) (when "the land was sold to other parties in fee simple absolute, the abnormal qualities of the Indian tenure were extinguished, and all the conditions which rendered exemption from taxes requisite and proper ceased to exist."); *Auditor General v. Williams, supra*, 94 Mich. at 184 (stating

that where the United States has relinquished control over property patented to Indians under the treaties of 1855 and 1864 via lifting all restrictions, "there can be no doubt of the right of the States to impose taxes upon it.").

Plaintiff United States argues that to equate alienability with taxability "would have brought into question a long line of Supreme Court cases, going back at least to *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), and would have implicitly overruled a number of decisions prohibiting state taxation of Indians' property." *Pl. U.S. Reply Br.*, p. 3. However, neither *McClanahan* nor its progeny addressed land owned by Indians in fee simple absolute; thus, the cases plaintiff fears would be overruled in truth would not be affected because on their facts they are vastly distinguishable. *McClanahan, Cotton Petroleum, Montana v, Blackfeet*, etc. all involved restricted trust land, owned by the [23] United States and held in trust for the benefit of the Indians.[16] They are not affected by the decisions in *Yakima* and in *Lummi*.

Plaintiffs also argue that the holding in *Lummi* is an improper expansion on the holding in *Yakima* and thus, should not be followed. Plaintiffs cite *Southern Ute Indian Tribe v. Board of County Comm'rs*, 855 F.Supp. 1194 (D.Colo. 1994), in support of this argument.

iii. Defining the holding in *Yakima* - Southern Ute

The plaintiffs and the court in *Southern Ute* contend that the *Yakima* Court rested its decision on the General Allotment Act's "unmistakably clear" expression of Congressional intent to allow taxation of the patented land and thus, would not countenance the general rule stated in *Lummi* that "if land is alienable, then it is taxable."

The court in *Southern Ute* states that:

> Alienability in *Yakima* and in *Goudy* was important only as an indicator of congressional intent to permit taxation in that the Court thought it illogical the Congress would have intended to permit conveyance of land yet hold it immune from taxation. It was not

an independent justification for taxation.

Southern Ute, 855 F.Supp. at 1200.

The same argument could be made here: alienability is important in indicating the intent of the parties to the treaty. [24] "[I]t [is] illogical [that] the [parties to the treaty] would have intended to permit conveyance of the land yet hold it immune from taxation." *Southern Ute, supra*. Furthermore, the insertion of a step whereby Congressional intent is gleaned from alienability, merely adds another layer of implication between alienability and taxability. The court is unable to see how such additional implication renders the result more reliable.

The court in *Southern Ute* and the instant plaintiffs urge that where express statutory authority is lacking (i.e. where there is an absence of the words equating alienability with subjection to state property tax),[17] there can be no implication of an intent to allow taxation of fee-patented lands.[18] Hence, plaintiffs and the court in *Southern Ute* conclude that the Ninth Circuit reads *Yakima* too broadly in concluding that "if alienable, then taxable."[19]

Even assuming the plaintiffs and the court in *Southern Ute* do not engage in implication, they have created a framework by which their own argument is lost. They argue that there was no implication of intent in *Yakima*; thus, the Ninth Circuit's reading [25] is too broad. However, the Court in *Yakima* did imply intent; thus, their own reading is too narrow.

The General Allotment Act provided:

> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee...then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State of Territory in which they may reside. Provided, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her own affairs at any time

> to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed.

25 U.S.C. § 349 (§ 6), cited in *Yakima*, 502 U.S. at 258, n. 1.

Thus, the only type of patented land that was expressly subject to taxation was that land which was "prematurely" patented by the Secretary before the conclusion of the trust period. However, the Court in *Yakima* did not limit its holding to those lands prematurely patented.

The Court in *Yakima* noted that the Burke Act proviso (1906) was enacted to "change the outcome of our decision in *Re Heff*, so that § 6's [25 U.S.C. § 349] general grant of civil and criminal jurisdiction over Indian allottees would not be effective until the 25-year trust period expired and patents were issued in fee." *Yakima*, 502 U.S. at 264 (internal citations omitted). The Court went on to note that the prematurely patented land would not subject the Indian patentee to plenary state jurisdiction but would only subject the land to freedom from "restrictions as to sale, incumbrance, or taxation." *Yakima*, 502 U.S. at 264; citing 25 U.S.C. § 349 (§ 6). [26]

The Court then concluded that "the proviso [Burke Act proviso, § 6] reaffirmed for such 'prematurely' patented land what § 5 of the General Allotment Act *implied with respect to patented land generally: subjection to state real estate taxes.*" *Yakima*, 502 U.S. at 264 (emphasis supplied). Because it was stated in terms of "reaffirming" an implication, such implication was certainly recognized by the Court as existing before it could be "reaffirmed."

This finding of implied intent to expose all fee patented land to taxation led the Court to conclude that "it is inconsequential that the trial record does not reflect 'which (if any) of the parcels owned in fee by the Yakima Nation or individual members originally passed into fee status pursuant to the proviso, rather than at the expiration of the trust period.'" *Yakima*, 502 U.S. at 264, n. 4. In other words, it did not matter whether the patents were

"premature" (which were to be expressly subjected to taxation) or not; the result was the same: the fee-patented alienable land would be taxable.

If the Court in *Yakima* had desired a narrow holding which would preclude taxation of land patented pursuant to an act of Congress which did not explicitly mention taxability, then it would have distinguished between those premature patents (whose subjection to taxation was explicit) and land patented at the conclusion of the 25-year trust period (whose subjection to taxation was not expressly stated and thus, could only be implied). *See, Blackmun, J.*, dissenting, 502 U.S. at 271 (dissenting in part [27] because there was no "unmistakably clear" Congressional intent with regard to the lands which were not prematurely patented); *see also, Lummi*, 5 F.3d at 1357 ("The Court [in *Yakima*] made no distinction between fee land allotted by treaty and that allotted under the Act. Its interpretation of Section 5 of the Act and the proviso to section 6 imply that no matter how the land became patented, it is taxable once restraints on alienation expire.").

Thus, it seems that the majority's holding in *Yakima* was not as narrow as the plaintiffs and the court in *Southern Ute* contend that it was.[20] Accordingly, their argument is not persuasive reasoning to depart from *Lummi*.

iv. whether *in rem* jurisdiction is a fiction

Plaintiff Tribe contended, during oral argument, that because the legal incidence of the taxes fall upon the Indians, *in rem* jurisdiction is a fiction. The plaintiff Tribe adds that "the fiction of any *in rem* nature of the Michigan real property taxes at issue in this case is further highlighted by Michigan's own statutes. For example, under Michigan's amended general property [28] Tax Act, real property is assessed to the owner, the assessment rolls must include the name and address of persons liable to the tax..." *Pl. Tribe Br.*, p. 7. First of all, plaintiff Tribe's argument is not supported by Michigan law. The applicable statute reads as follows:

Real property shall be assessed in the township or

> place where situated, to the owner if known, and also to the occupant, if any; if the owner be not known and there be an occupant, then to such occupant, and either or both shall be liable for the taxes on said property, and if there be no owner or occupant known, then as unknown.

Mich. Comp. Laws, § 211.3. Assessment to "the unknown" is an assessment on the property itself. *See, Weber v. Enoch C. Roberts Iron Ore Co.*, 270 Mich. 38, 44 (1935) ("The tax levies were under procedure *in rem* and validity thereof was not affected by dissolution of the corporation."); *Auditor General v. Williams, supra.*

At oral argument, counsel on behalf of the Tribe also urged that Indians be held exempt from *ad valorem* property taxes because they do not reap the benefits of those taxes, e.g. public schools. However, if the validity of taxation depended on reciprocity or mutuality, all those retired octogenarians owning land in Florida would be exempt from property taxation because they do not send children to school and thus, do not reap the fruits of their property tax payments. Portions of like arguments may seem enticing but such is not the law. Instead, the "traditional notion [is] that taxation is not premised on a strict quid pro quo relationship between the taxpayer and the tax." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 185, n. 15 (1989). [29]

c. Other arguments

The plaintiffs offer a number of other arguments, beyond the analysis of the recent case law,[21] to support their position. These other arguments invoke sovereignty, sovereign immunity, or personal immunity exemption of Indians and tribes. Consequently, analysis of these issues focuses on the persons who own the land, i.e. *in personam* jurisdiction. As noted earlier, the relevant inquiry here is *in rem.*

Analysis of these other issues presented would not lead to a different result absent the Court's decision in *Moe, supra*, 425 U.S. at 478, which extended *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351

(1962) (criminal jurisdiction case) to civil jurisdiction issues. The Court in *Moe* held that the state was precluded from exercising taxing authority over activities (i.e., cigarette sales) within reservation bounds, even those occurring on lands owned in unrestricted fee simple. *Moe, supra.* The Court reasoned that such "checkerboard" jurisdiction would be as "impractical" as it would be in the criminal arena where "'enforcement officers operating in the area [would have to] search tract books in order to determine [] criminal jurisdiction...even though committed within the reservation.'" *Moe,* 425 U.S. at 478, *citing Seymour,* 368 U.S. at 358. [30]

There is nothing in the statutory definition of Indian country,[22] or in the doctrine of Indian sovereignty[23] and the [31] correlative notion of immunity,[24] that would lead to a result different from that reached in *Yakima* and *Lummi.* All of these [32] paths show Indian sovereignty as a dependent adjunct of the supremacy/pre-emption enjoyed by the United States against the individual states.

However, since the Court in *Moe* and *Seymour* rejected any definition that would create a pragmatic problem in defining jurisdiction, the Court in *Yakima* needed to recognize the *in rem* nature of *ad valorem* property tax jurisdiction to avoid *Moe* and *Seymour*'s prohibition against checkerboarding in the personal jurisdiction arena.[25]

d. Nonintercourse Act

The United States also contends that the Non-Intercourse Act requires the plaintiffs be held immune from taxation. *Pl. U.S. Br.,* pp. 16-19. The Act provides, in pertinent part:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or in equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. § 177 (Non-Intercourse Act).

Since the Act, by its language, applies to land acquired from Indian tribes, not by Indian tribes, its relevance here is not readily apparent. Furthermore, the elements of a *prima facie* case for a violation of the Nonintercourse Act require, as element three, that "the United States has **never** approved or consented to [33] the alienation of the tribal land." *Catawba Indian Tribe v. South Carolina*, 718 F.2d 1291, 1295 (4th Cir. 1983) (emphasis supplied).[26] Here, the United States approved of alienation when it issued the unrestricted fee patent. Thus, element three could not be established, even if a claim under the Act were possible under these facts.

The Act is generally invoked by Indians to defeat title held by others where such title was acquired without consent of the United States. *See, e.g., County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (finding land bought by the state after the enactment of the Nonintercourse Act violated the Act where the purchase was made without the consent of the United States, thus giving Indians title to the land). Thus, in the ordinary course, the Act is cited in cases where ownership is at issue. In the instant case, all agree on who owns the land and thus no battle for title is waged.

The Act is relied upon by and its pertinence revealed by the United States. The United States argues that "since tribal fee [34] lands cannot be conveyed without federal approval, then the State and county cannot, by way of taxation, foreclosure and tax sale, effect an involuntary transfer of tribal land." *Pl. U.S. Br.*, p. 19.

This argument begins with the premise that even unrestricted fee lands owned by the Tribe cannot be sold absent consent of the United States. Unrestricted fee title is, by definition, capable of being conveyed, i.e. alienable. Heretofore, the United States' argument has been that although it is alienable, it is not taxable. Now, however, the United States appears to contend that the Nonintercourse Act returns unrestricted fee land to trust status immediately when that unrestricted fee land is bought by an Indian or the Tribe.

The only authority offered by the United States in support of this premise is *Alonzo v. United States*, 249 F.2d 189 (10th Cir. 1957), cert. denied, 355 U.S. 940 (1958). Upon close review, however, the Nonintercourse Act plays a small role in the decision of the Tenth Circuit. In *Alonzo*, the United States contended that title to lands held by the Pueblos was subject to restrictions against alienation even though said title was, on its face, that of unrestricted fee simple. The Tenth Circuit agreed that the land owned by the Pueblos was restricted fee land, finding support for its decision in the Nonintercourse Act, the New Mexico, Arizona Enabling Act, but, most importantly, on Sec. 17 of the Act of June 7, 1924, 43 Stat. 636, 641. The court in *Alonzo* stated:

> But if we be wrong in our conclusion, which we do not concede, that the Enabling Act did not by implication [35] remove restrictions with respect to lands acquired by the Pueblos by purchase, such restrictions were clearly reimposed by Sec. 17 of the Act of 1924, which clearly applies without qualification to all lands of the Pueblo Indians of New Mexico. The power of Congress to reimpose restrictions while the Pueblos were still wards of the Nation is not open to question.

Alonzo, 249 F.2d at 196. Thus, there was particularized statutory authority relating to Pueblos which reimposed restrictions upon land owned by them; the court did not rely on a broad reading of the Nonintercourse Act, as the United States would have this court do.

Although the result reached in *Alonzo* is attractive to the United States, the path of reasoning leading to the goal is a dark one which the United States would surely prefer not to reenter. The court in *Alonzo* stated that:

> the reason for the imposition of restrictions is in no wise related to the manner in which the Indians reacquired their lands. The purpose of restrictions is to protect the Indians, 'a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races' against the loss of their lands by

> improvident disposition or through overreaching by members others. There is as great a need for such protection of the Pueblos in New Mexico, with respect to their lands acquired by purchase, as there is to lands otherwise acquired.

Alonzo, 249 F.2d at 196. To hold that all land held by Indians to Tribes should be restricted, in order to protect the owners from their own mistakes, would be a regressive step toward regarding the relationship of the United States to Indians as that of "guardian [36] to ward."[27] The court is not willing to take such a step backward, especially in the face of law to the contrary.[28]

Furthermore, if all land held by Indian tribes were automatically restricted by operation of the Nonintercourse Act, then the Tribe would not have to submit to the cumbersome and lengthy process the United States referred to in oral argument and in its briefs whereby Tribes may petition the Department of the Interior to place lands owned by them into trust. *See*, 25 C.F.R. § 151.9 (1992).[29] If return to trust status were automatic via the [37] Nonintercourse Act, a petitioning process to return land to trust status would be superfluous.

The Tribe also objects not only to the lengthy process but to its results. The Tribe argues that it is "no remedy to tell the Tribe it can avoid state taxation simply by not owning property." *Tribe Reply Br.*, p. 5. In other words, the Tribe wants the tax exemptions that trust property enjoys (because owned by the United States), with all the freedom of outright ownership. This argument asks not for automatic trust status, but for automatic tax exemption upon re-purchase by Indians. An analogous argument was squarely rejected in the only similar case of which the court is aware: *McCurdy v. United States*, 246 U.S. 263 (1918).

In *McCurdy*, the land at issue had been part of a reservation, was sold and purchased by a non-Indian and thus, was subjected to *ad valorem* property taxes. *McCurdy*, 246 U.S. at 267. The land was then purchased by a trustee (Brenner) for Robert and Emma Panther, out of Indian trust funds held on behalf of Robert Panther. *Id.* Soon thereafter,

Brenner conveyed the land to Robert Panther individually. That deed provided that the land was inalienable and not subject to transfer, sale, or encumbrance for eighteen years (from July 1913) absent approval from the Secretary of the Interior. *Id.* The Court held that since Congress did not create the restriction (nor delegate the authority to the Secretary of the Interior), nor was title in the United States, the land was not exempt from taxation. *McCurdy*, 246 U.S. at 272, contrasting *United* [38] *States v. Rickert*, 188 U.S. 432 (1903) (finding tax exemption for land where title was in the United States held in trust for the benefit of the Indians). Consequently, Indian ownership is not sufficient to render land exempt from taxes.[30]

i. relationship between alienation and taxation

The argument by the United States under the Nonintercourse Act rests upon the interdependence of alienability with taxability. Unwittingly, the United States has conceded a major portion of its argument by contending that the Nonintercourse Act applies to restrict the land from alienation, and thus, protect the land from taxation.

The United States argues that "since tribal fee lands cannot be conveyed without federal approval, then the State and county cannot, by way of taxation, foreclosure and tax sale, effect an involuntary transfer of tribal land." *Pl. U.S. Br.*, p. 19. This argument recognizes the link between alienation, taxation, and encumbrance. Encumbrance and taxation are means of accomplishing alienation. *Auditor General v. Williams*, 94 Mich. at 189 ("it [the United States] prohibits the alienation of the land conveyed to that class [of not so competents] in severalty; and having done so, [39] it has a right to insist that such alienation shall not be brought about by the execution of state tax laws."). Thus, as the United States concedes, if land is subject to taxes, then it is subject to alienation. The converse cannot be denied, for it requires no further implication, deduction, or induction. If land is subject to alienation, then it is subject to taxes. With perfect title, the land enjoys the freedom to be alienated, the responsibility of being taxed, and the vulnerability to encumbrance. Thus, it is not illogical to imply alienability and taxability when a perfect fee-simple

absolute estate is created by unrestricted fee-patent.

IV. Conclusion

For the reasons stated above, defendants' motions for summary judgment are GRANTED and plaintiffs' motions for summary judgment are DENIED. Accordingly, the case is DISMISSED.

IT IS SO ORDERED.

/s/
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

DATED: March 23rd, 1995

[1] Complete summary judgment has been requested by the United States and partial summary judgment has been requested by the Saginaw Chippewa tribe, and jointly by defendants State of Michigan, Isabella County, and City of Mt. Pleasant. Joint defendants' previous motion asked to establish the extent of the reservation. However, in their brief regarding taxation, the relief requested includes the previous request plus a determination on the ultimate issue that "unrestricted fee lands located within the boundaries of the Isabella Reservation are subject to the State of Michigan's ad valorem property tax." Thus, it appears that, at this juncture, they request complete, not partial, relief.

[2] At the time the complaint was filed, ten parcels were owned by individual members of the Tribe and one parcel was owned by the Tribe.

[3] *But see, City of Mount Pleasant Answer*, p. 3, ¶ 7 ("without knowledge or information sufficient to form a belief and therefore neither admits nor denies the same").

[4] There remains some question as to whether the lands involved in this dispute all stem from the unrestricted patent issued to James Gruette or whether some land title stems from unrestricted patents issued to other individuals. However, the *identity* of the patent-holder is of no import to the instant inquiry.

[5] This portion of the treaty is commonly referred to by the parties as the "dissolution clause."

[6] *U.S. v. Holliday*, 70 U.S. 407, 419 (1866).

[7] *But see, Oyler v. Finney, et al.*, 1994 WL 728222 (D.Kan. 1994) (dismissing action based on lack of subject matter jurisdiction due to the tax injunction statute and the principle of comity).

[8] The degree of unmistakability that attends Congressional intent (i.e., whether clear intent to permit taxation requires use of the term taxation of whether intent to allow taxation is clear when the land is made alienable) will be examined under b (iii), which is entitled "Defining the holding in *Yakima - Southern Ute.*"

[9] This last phrase refers to Indian country which is currently explained by case law as being land which "has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government.'" *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991).

[10] The Court in *Mescalero* held that state taxation of the ski resort's gross receipts was proper. Since the income there was directly derived from the federally-owned land (i.e., the convergence of hills, winter weather, and the joyful willingness of certain enthusiasts to let gravity have its way), the Court's holding distinguished itself from prior cases which held that income derived directly from tax-exempt trust land was also exempt from tax. *Mescalero*, 411 U.S. at 156, noting and declining to apply the principles stated in *Squire v. Capoeman*, 351 U.S. at 9 (which held that income directly derived from tax-exempt trust land is likewise tax-exempt).

The land in *Mescalero* was tax-exempt federally owned land, but was not tax-exempt trust land held for the benefit of the Indians, as it was in *Squire*. Since lessees of federally-owned land are not immune from income tax generally, the sole basis for any income tax immunity in *Mescalero* would have been the status of the lessees as

Indians. However, the status of the lessees as Indians was not sufficient to render their gross receipts income immune from tax in *Mescalero*.

Instead, the basis for Indian income tax immunity appears to be rooted not on any relative of sovereignty but solely upon its direct derivation from tax-exempt trust land as evidenced by revenue rulings passed in 1956 to comport with the holding in *Squire* and the amended version therefrom which sets forth the following 5-part test for determining whether Indian income would be immune from taxation: (1) the land is held in trust by the United States; (2) the land is restricted; (3) the income is derived directly from the land; (4) statute, treaty, or other authority evinces intent the allotment be used to protect the Indian; (5) authority clearly indicates the "land is not to be taxed until conveyed in fee simple to the allottee." *Critzer v. United States*, 597 F.2d 708, 713, n. 19 (U.S.Ct.Cl. 1979), cert. denied, 444 U.S. 920.

Direct derivation was strictly construed such that income earned while on trust land but not from trust land or reinvested income was not afforded tax exempt status. *Critzer*, 597 F.2d at 713 (rejecting plaintiff's argument that income derived from a restaurant businesses, located on trust land, was directly derived from the land, contrasting *Squire*, where the sale of timber created income directly derived from the land). In exemplifying the limits of the doctrine, the court stated:

> If plaintiff were to sit in a telephone booth on her Indian land and sell stocks and bonds by phone from the booth, it would be ludicrous to attempt to argue that any income, so earned, was directly derived from the land.

Critzer, 597 F.2d at 713

The court in *Critzer* also expressly rejected any claim of tax exempt status based solely on the fact that plaintiff was an Indian, noting that "If Congress wishes to exempt any class of citizens from the federal income tax, it knows how to do it. We have no authority to do so." *Critzer*, 597 F.2d at 714.

Thus, it appears that the only immunity afforded Indians derives from the trust relationship which in turn derives from the paternalistic role taken by the United States as guardian over the Indians as wards. *See, Cherokee Nation*

v. Georgia, 30 U.S. 1 (1831). If the Indians enjoyed an independent tax immunity, the result in *Mescalero* would have been different with respect to the gross receipts tax.

This conclusion is strengthened by the fact that the Court in *Mescalero* held the use tax imposed on the ski lift equipment tax-exempt because the equipment had become a fixture, and thus a part of the tax-exempt land. *Mescalero*, 411 U.S. at 158.

11 Since the statute provided for complete income tax immunity for Indians residing within reservation bounds, the statute abrogated the need to inquire whether income was directly derived from tax-exempt trust land. *See, supra*, n. 10.

12 This conclusion is actually supported by *Kennerly, supra*, wherein the Court held that the tribal consent to state jurisdiction of criminal matters was not sufficient to confer jurisdiction upon the state of Montana. *Kennerly*, 440 U.S. at 426. The state attempted to argue that *Williams v. Lee*'s recognition of tribal sovereignty should support the conclusion that the tribe could create state jurisdiction by consenting thereto. The Court in *Kennerly* rejected that argument. Instead the Court found that the only Congressional means of creating state jurisdiction within reservation bounds required the Secretary of the Interior to conduct an election and such procedure had not been complied with by the tribe. *Kennerly*, 440 U.S. at 429. If Indian sovereignty had any independent power, the result in *Kennerly* would have been different.

13 The court chooses to engage in this analysis of *Yakima*'s history--including the conclusion that holdings in these cases may well have sprung from *obiter dictum*--fully cognizant of the implicit irony: this portion of the court's opinion is itself *dictum*.

14 This holding implies that all Indian activity carried on within reservation bounds is tax exempt, absent Congressional authority to tax. This conclusion must also rest on the precept that taxation of reservation Indians and reservation lands is precluded absent authority of Congress. *Mescalero*, 411 U.S. at 148. However, since the land in

Yakima was not trust land, income directly derived from its sale would similarly lack exemption from taxation absent *Mescalero/McClanahan* dicta and *Moe's* rejection of a civil personal jurisdiction checkerboard whose squares distinguish unrestricted fee-patented lands from trust lands. *Cf., supra,* n. 10.

15 The *per se* rule shares its origin with the precept stated in *Yakima,* that taxation of reservation Indians and lands is precluded absent clear Congressional intent. *See, California v. Cabazon,* 480 U.S. at 215, n. 17, which credits *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 765 (1985), which credits *Bryan v. Itasca County,* 426 U.S. 373, 392-393 (1976), which in turn credits *McClanahan v. Arizona State Tax Comm'n, supra.* Accordingly, it too is subject to challenge. *See, supra,* part III(B) (1) (a) of this opinion.

16 As noted earlier, the land in *Mescalero* was federally owned land which was leased to the Indians. As further noted, the holding was much different from the dictum contained therein. Accordingly, it presents its own unique situation. *See, supra,* part III(B) (1) (a) of this opinion.

17 *Pl. U.S. Br.,* p. 9 ("Neither the 1855, nor the 1864 Treaty, however, makes any reference to taxation.").

18 *Pl. U.S. Br.,* p. 10 ("taxation of reservation Indians cannot rest on an implication."). However, here it is not "reservation Indians" being taxed, it is fee-patented land.

19 As stated earlier, this presumption against taxation absent express Congressional authority appears to have been inverted by the Court in *Mescalero, supra.* However, for purposes of this analysis, the court will assume its validity, as did the Court in *Yakima* and the parties in the instant case. *Pl. U.S. Reply Br.,* pp. 3-4.

20 Plaintiff United States also argues that if alienability were the touchstone of *Yakima,* then there would have been no need for the remand ordered therein. However, the remand in *Yakima, supra,* was ordered to first resolve a factual issue because "it is not clear whether the parcels at issue in this case were patented under the General Allotment

Act," and if the parcels were not all patented under the Act, the court on remand was to decide "whether it makes any difference." *Yakima*, 502 U.S. at 269. The Supreme Court's reluctance to launch into the legal resolution of issues which might not arise, depending on the resolution of factual issues, cannot be read as more than an effort to avoid creating dicta.

21 Prior case law did not distinguish between the *in rem* and *in personam* jurisdiction as did the Court in *Yakima* and its progeny.

22 Indian country is defined as "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent... (b) all dependent Indian communities within the borders of the United States...(c) all Indian allotments, the Indian titles [restricted fees] to which have not been extinguished...." 18 U.S.C. 1151.

Its definition requires the land within reservation bounds to be "under the jurisdiction of the United States" which would imply ownership by the United States. To construe the phrase "under the jurisdiction of the United States" differently, i.e., as coterminous with Indian Country, would be circular and would render the phrase superfluous.

Case law has similarly defined Indian country as land under the control of the United States: "the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation.' Rather, we ask whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government.' *Oklahoma Tax Comm'n*, 498 U.S. at 511 (sales tax case).

23 Indian tribal sovereignty was first recognized as a viable notion by Chief Justice Marshall in the oft-cited decision of *Worcester v. Georgia*, 31 U.S. 515 (1832). However, it is clear that the basis for the holding was primarily the supremacy of the United States and not Indian sovereignty. The Court found not inherent tribal sovereignty, but that the state statute was "repugnant to the Constitution, laws, and treaties of the United States" and in "direct hostility with treaties [of the United States]."

Worcester, 31 U.S. at 539.

This conclusion is buttressed by references made by Chief Justice Marshall in his opinion declining federal court jurisdiction because the Cherokee nation could not be considered a foreign nation in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), one year prior to *Worcester*. Here, Chief Justice Marshall denominated Indian tribes as "domestic, dependent nations." *Id.* at 17. He also stated that "they are in a state of pupilage [to the United States] ... which resembles that of ward to guardian." *Id.* at 17. Even more revealing is the following passage:

> They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.

Cherokee Nation v. Georgia, 30 U.S. at 17-18.

Nonetheless, most cases cite *Worcester* as an example of the days when Indian tribal sovereignty flourished, only to be lost to the perspectives of later courts. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980) ("Long ago the Court departed from Mr. Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries.").

Today, the accepted delineation of tribal authority is found in *Montana v. United States*, 450 U.S. 544, 564 (1981). The Court states that as to internal tribal matters, the tribe's power is limitless; whereas, as to external relations, tribes are powerless, unless one of two possible exceptions apply:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health

and welfare of the tribe.
Montana v. United States, 450 U.S. 544, 565-566 (1981).

[24] "A doctrine of Indian tribal sovereign immunity was originally enunciated by this Court and has been reaffirmed in a number of cases. *Turner v. United States*, 248 U.S. 354, 358, (1919)." *Potawatomi*, 498 U.S. at 510.

Turner held that an Indian tribal member could not seek recovery of damages from its sovereign, the Tribe. *Id.* However, *Turner* is cited as standing for the rule that sovereign immunity protects tribes from suit by outside entities, such as states. *E.g., Potawatomi, supra.*

The first case to cite *Turner* and to expand its holding was *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940) (holding that a bankruptcy court was without jurisdiction to "adjudicate a cross-claim against the United States", implying supremacy more than immunity, but confusing matters by also concluding that "[t]hese Indian Nations are exempt from suit without Congressional authorization.").

Since a sovereign is immune only from those it governs, the only manner in which Indian tribes could stand immune from suit by non-members is to equate suit against the tribes with suit against the United States itself. However, courts have not stated the theory with candor and instead have enveloped Indian Tribes with a preternatural sovereign immunity since *United States Fidelity.*

[25] As noted earlier, the Court in *Yakima* found that the same checkerboarding in the *in rem* arena would not cause untenable results because the tax assessors must resort to plat maps to make parcel-by-parcel determinations anyway. *Yakima*, 502 U.S. at 264.

[26] The elements in their entirety are as follows:

> (1) that it is or represents an Indian tribe within the meaning of the Nonintercourse Act; (2) that the land in issue is covered by the Nonintercourse Act as tribal land; (3) that the United States has never approved or consented to the alienation of the tribal land; (4) that the trust relationship between the United States and the tribe, established by coverage of the

> Nonintercourse Act, has never been terminated or abandoned.

Catawba Indian Tribe, 718 F.2d at 1295.

[27] *See, e.g., Catawba, supra*, 718 F.2d at 1298-99 ("The Nonintercourse Act creates a trust or fiduciary relationship between the federal government and the tribe somewhat akin to the relationship of guardian and ward.").

[28] Although stated in more palatable terminology, the passage cited by the United States reveals that restricting the alienability of land based on the status of the titleholder is founded on the fear of the consequences of outright ownership:

> Today, the statutory restraints on alienation of Indian land insulate the Indian lands from the full impact of market forces, preserving the Indian land base for the furtherance of Indian values. **If tribal land were not subject to restraints on alienation and tax immunities, market forces and state tax assessors would eventually erode Indian ownership of the reservation * * *** The continued enforcement of federal restrictions, in this view, derives not from a presumed incompetence of the 'ward,' but from a perceived value in the desirability of a separate Indian culture and polity.

F. Cohen, Handbook of Federal Indian Law, (1982 ed. p. 509-10), as cited in *Pl. U.S. Br.*, p. 17 (emphasis provided). To invoke demons named "market forces" and "tax assessors" is perhaps less offensive than the terms of old, i.e. "the intelligence and greed of other races." However, this cloaked mistrust of Indians is mistrust nonetheless at its core.

[29] One of the factors to be considered by the Secretary of the Interior is the impact on the state resulting from removal of the land from the tax rolls. 25 C.F.R. § 151.10(a). Of course, removal from the tax rolls contemplates the ability of the state to have taxed the land prior to it becoming trust land.

[30] *Compare, Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073, 1077 (10th Cir. 1993) ("If the restriction against alienation were sufficient to make any land purchased by the UKB [United Keetoowah Band of Cherokee Indians] Indian country, the UKB could remove land from state jurisdiction and force the federal government to exert jurisdiction over that land without either sovereign having any voice in the matter. Nothing in *McGowan* or the cases concerning trust land indicates the Supreme Court intended for tribes to have such unilateral power.").

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,
on behalf of the Saginaw
Chippewa Tribe and its members,

Plaintiff,

SAGINAW CHIPPEWA INDIAN
TRIBE OF MICHIGAN, on its
own behalf and as parens
patriae for its members,

Plaintiff-Intervenor, Case No: 91-CV-10103-BC

v.

STATE OF MICHIGAN, COUNTY
OF ISABELLA, CITY OF MOUNT
PLEASANT, UNION TOWNSHIP,
ISABELLA TOWNSHIP, DENVER
TOWNSHIP, CHIPPEWA TOWNSHIP,
STEVEN PICKENS, and DUANE
SHERWOOD,

Defendants.

JUDGMENT

In accordance with the court's order granting summary judgment in favor of defendants entered this date,

IT IS ORDERED AND ADJUDGED that judgment be, and hereby is **GRANTED** in favor of defendants and against plaintiffs; and

IT IS FURTHER ORDERED AND ADJUDGED that this action is **DISMISSED.**

/s/
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

DATED: March 23rd, 1995

4949

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,
on behalf of the Saginaw
Chippewa Tribe and its members,

Plaintiff,

SAGINAW CHIPPEWA INDIAN
TRIBE OF MICHIGAN, on its
own behalf and as parens
patriae for its members,

Plaintiff-Intervenor, Case No: 91-CV-10103-BC

v.

STATE OF MICHIGAN, COUNTY
OF ISABELLA, CITY OF MOUNT
PLEASANT, UNION TOWNSHIP,
ISABELLA TOWNSHIP, DENVER
TOWNSHIP, CHIPPEWA TOWNSHIP,
STEVEN PICKENS, and DUANE
SHERWOOD,

Defendants.

ORDER DENYING PLAINTIFF SAGINAW CHIPPEWA TRIBE'S MOTION TO ALTER AND AMEND IN PART AND GRANTING SAME IN PART

This matter is before the court on plaintiff Saginaw Chippewa Tribe's motion to alter or amend under Fed.R. Civ.P. 59. Rule 59 permits a court to "amend findings of fact or conclusions of law" for the "reasons for which rehearings have heretofore been granted." Fed.R.Civ.P. 59(a).

The court believes that the grounds for plaintiff's motion are largely without merit. However, the plaintiff reveals a typographical error which will hereby be corrected.

At the top of page 10 of the order of March 23, 1995, the reference to section "b(iii)" should be to section "a(iii)," and is hereby amended to so read. Accordingly, plaintiff's motion to amend is GRANTED IN PART as to this typographical error.

As to the balance of plaintiff's motion, the motion will be denied. Plaintiff contends that although the court stated that it would decline to address issues of reservation status, "the Court addressed the status of the land at issue and mistakenly and unnecessarily stated without analysis that the lands involved are not reservation lands." *Memorandum in Support*, p. 1.

As noted, the court expressly declined to address the issue of whether the Saginaw Chippewa reservation was created and maintained. *Opinion*, p. 5.

Furthermore, there is no "de facto decision that the Isabella reservation consists only of lands held in trust for the Tribe." *Memorandum in Support*, p. 2. The court's discussion of "reservation lands" was in the context of analyzing the *Yakima* precept. As conceded by the plaintiff, the court applied the *Yakima* precept to the instant facts. Therefore, the court treated the lands involved as "reservation lands" in applying the *Yakima* precept. Any concern or disagreement voiced by the court over the propriety of applying the precept is dicta, as observed in n. 13. Thus, plaintiff's contention lacks merit.

Therefore, plaintiff's motion to alter and amend is DENIED as to all contentions EXCEPT to correct the reference on page 10 to section "b(iii)" to read section "a(iii)."

IT IS SO ORDERED.

/s/
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

DATED: April 17, 1995

Dawes Act (General Allotment Act)
24 Stat. 388 (1887)
25 U.S.C. 331 *et seq*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, [SEC. 1] That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

To each head of a family, one-quarter of a section;

To each single person over eighteen years of age, one-eighth of a section;

To each orphan child under eighteen years of age, one-eighth of a section; and

To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section: *Provided*, That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: *And provided further*, That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: *And provided further*, That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

* * *

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the united States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act: *And provided further*, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the Untied States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: *Provided*

however, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further*, That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And hereafter in the employment of Indian police, or any other employes [sic] in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and

every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

* * *

Approved February 8, 1887.

Burke Act
34 Stat. 186 (1906) (amending Dawes Act)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section six of an Act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," be amended to read as follows:

"SEC. 6. That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable for the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued

shall be subject to the exclusive jurisdiction of the United States: *And provided further,* That the provisions of this Act shall not extend to any Indians in the Indian Territory."

That hereafter when an allotment of land is made to any Indian, and any such Indian dies before the expiration of the trust period, said allotment shall be cancelled and the land shall revert to the United States, and the Secretary of the Interior shall ascertain the legal heirs of such Indian, and shall cause to be issued to said heirs and in their names, a patent in fee simple for said land, or he may cause the land to be sold as provided by law and issue a patent therefor to the purchaser or purchasers, and pay the net proceeds to their heirs, or their legal representatives, of such deceased Indian. The action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final.

Approved May 8, 1906.

ARTICLE 1, AS AMENDED, OF A TREATY WITH THE CHIPPEWA OF SAGINAW, ETC., AUGUST 2, 1855.

ARTICLE 1. The United States will withdraw from sale, for the benefit of said Indians, as herein provided, all the unsold public lands within the State of Michigan embraced in the following description, to wit:

First. Six adjoining townships of land in the county of Isabella, to be selected by said Indians within three months from this date, and notice thereof given to their agent.

Second. Townships Nos. 17 and 18 north, ranges 3, 4, and 5 east.

The United States will give to each of the said Indians, being a head of a family, eighty acres of land; and to each single person over twenty-one years of age, forty acres of land; and to each family of orphan children under twenty-one years of age, containing two or more persons, eighty acres of land; and to each single orphan child under twenty-one years of age, forty acres of land; to be selected and located within the several tracts of land hereinbefore described, under the same rules and regulations, in every respect, as are provided by the agreement concluded on the 31st day of July, A.D. 1855, with the Ottawas and Chippewas of Michigan, for the selection of their lands.

And the said Chippewas of Saginaw and of Swan Creek and Black River, shall have the same exclusive right to enter lands within the tracts withdrawn from sale for them for five years after the time limited for selecting the lands to which they are individually entitled, and the same right to sell and dispose of land entered by them, under the provisions of the Act of Congress known as the Graduation Act, as is extended to the Ottawas and Chippewas by the terms of said agreement.

And the provisions therein contained relative to the purchase and sale of land for school-houses, churches, and educational purposes, shall also apply to this agreement.

ARTICLE 1 OF A TREATY WITH OTTOWAS AND CHIPPEWAS, JULY 31, 1855.

ARTICLE I. The United States will withdraw from sale for the benefit of said Indians as hereinafter provided, all the unsold public lands within the State of Michigan embraced in the following descriptions to wit:

* * *

The United States will give to each Ottowa and Chippewa Indian being the head of a family, 80 acres of land, and to each single person over 21 years of age, 40 acres of land, and to each family of orphan children under 21 years of age containing two or more persons, 80 acres of land, and to each single orphan child under 21 years of age, 40 acres of land to be selected and located within the several tracts of land hereinbefore described under the following rules and regulations: --

Each Indian entitled to land under this article may make his own selection of any land within the tract reserved herein for the band to which he may belong--*Provided*, That in case of two or more Indians claiming the same lot or tract of land, the matter shall be referred to the Indian agent, who shall examine the case and decide between the parties.

For the purpose of determining who may be entitled to land under the provisions of this article, lists shall be prepared by the Indian agent, which lists shall contain the names of all persons entitled, designating them in four classes. Class 1st, shall contain the names of heads of families; class 2d, the names of single persons over 21 years of age; class 3d, the names of orphan children under 21 years of age, comprising families of two or more persons, and class 4th, the names of single orphan children under 21 years of age, and no person shall be entered in more than one class. Such lists shall be made and closed by the first day of July, 1856, and thereafter no applications for the benefits of this article will be allowed.

At any time within five years after the completion of

the lists, selections of lands may be made by the persons entitled thereto, and a notice thereof, with a description of the land selected, filed in the office of the Indian agent in Detroit, to be by him transmitted to the office of Indian Affairs at Washington City.

All selections of land under this article must be made according to the usual legal subdivisions; and fractional lots, if containing less than 60 acres, may be regarded as forty-acre lots, if over sixty and less than one hundred and twenty acres, as eighty-acre lots. Selections for orphan children may be made by themselves or their friends, subject to the approval of the agent.

After selections are made, as herein provided, the persons entitled to the land may take immediate possession thereof, and the United States will thenceforth and until the issuing of patents as hereinafter provided, hold the same in trust for such persons, and certificates shall be issued in a suitable form guaranteeing and securing to the holders their possession and an ultimate title to the land. But such certificates shall not be assignable and shall contain a clause expressly prohibiting the sale or transfer by the holder of the land described therein.

After the expiration of ten years, such restriction on the power of sale shall be withdrawn, and a patent shall be issued in the usual form, to each original holder of a certificate for the land described therein, provided that such restriction shall cease only upon the actual issuing of the patent; and provided further that the President may in his discretion at any time in individual cases on the recommendation of the Indian agent when it shall appear prudent and for the welfare of any holder of a certificate, direct a patent to be issued. And provided also, that after the expiration of ten years, if individual cases shall be reported to the President by the Indian agent, of persons who may then be incapable of managing their own affairs from any reason whatever, he may direct the patents in such cases to be withheld, and the restrictions provided by the certificate, continued so long as he may deem necessary and proper.

Should any of the heads of families die before the

issuing of the certificates or patents herein provided for, the same shall issue to the heirs of such deceased persons.

The benefits of this article will be extended only to those Indians who are at this time actual residents of the State of Michigan, and entitled to participate in the annuities provided by the treaty of March 28, 1836; but this provision shall not be construed to exclude any Indian now belonging to the Garden River Band of Sault Ste. Marie.

All the land embraced within the tracts hereinbefore described, that shall not have been appropriated or selected within five years, shall remain the property of the United States, and the same shall thereafter, for the further term of five years, be subject to entry in the usual manner and at the same rate per acre as other adjacent public lands are then held, by Indians only; and all lands, so purchased by Indians, shall be sold without restriction, and certificates and patents shall be issued for the same in the usual form as in ordinary cases; and all lands remaining unappropriated by or unsold to the Indians after the expiration of the last-mentioned term, may be sold or disposed of by the United States as in the case of all other public lands.

Nothing contained herein shall be so construed as to prevent the appropriation, by sale, gift, or otherwise, by the United States, of any tract or tracts of land within the aforesaid reservations for the location of churches, schoolhouses, or for other educational purposes, and for such purposes purchases of land may likewise be made from the Indians, the consent of the President of the United States, having, in every instance, first been obtained therefor.

ARTICLE 3 OF A TREATY WITH THE CHIPPEWA INDIANS. OCTOBER 18, 1864.

ARTICLE III. So soon as practicable after the ratification of this treaty, the persons who have heretofore made selections of lands within the townships upon Saginaw Bay, hereby relinquished, may proceed to make selections of lands upon the Isabella reservation, in lieu of their selections aforesaid, and in like quantities.

After a reasonable time shall have been given for the parties aforesaid to make their selections in lieu of those relinquished, the other persons entitled thereto may then proceed to make their selections, in quantities as follows, viz:--

For each chief of said Indians who signs this treaty, eighty acres in addition to their selections already made, and to patents in fee simple.

For one headman in each band into which said Indians are now divided, forty acres, and to patents in fee simple.

For each person being the head of a family, eighty acres.

For each single person over the age of twenty-one years, forty acres.

For each orphan child under the age of twenty-one years, forty acres.

For each married female who has not heretofore made a selection of land, forty acres.

And for each other person now living or who may be born hereafter, when he or she shall have arrived at the age of twenty-one years, forty acres, so long as any of the lands in said reserve shall remain unselected, and no longer.

In consideration of important services rendered to said Indians during many years past by William Smith, John

Collins 1st, Andrew J. Campeau, and Thomas Chatfield, it is hereby agreed that they shall each be allowed to select eighty acres in addition to their previous selections, and receive patents therefor in fee simple; and to Charles H. Rodd, eighty acres, and a patent therefor in fee simple, to be received by said Rodd as a full consideration and payment of all claims he may have against said Indians, except claims against individuals for services rendered or money expended heretofore by said Rodd for the benefit of said Indians.

It is understood and agreed that those Ottawas and Chippewas and Pottawatomies now belonging to the bands of which Metayomeig, May-me-she-gaw-day, Keche-kebe-me-mo-say, and Waw-be-maw-ing-gun are chiefs, who have heretofore made selections upon said reservations, by permission of said Chippewas of Saginaw, Swan Creek, and Black River, who now reside upon said reservation in Isabella county, or who may remove to said reservation within one year after the ratification of this treaty, shall be entitled to the same rights and privileges to select and hold land as are contained in the third article of this agreement.

So soon as practicable after the ratification of this treaty, the agent for the said Indians shall make out a list of all those persons who have heretofore made selections of lands under the treaty of August 2d, 1855, aforesaid, and of those who may be entitled to selections under the provisions of this treaty, and he shall divide the persons enumerated in said list into two classes, viz: "competent" and "those not so competent."

Those who are intelligent, and have sufficient education and are qualified by business habits to prudently manage their affairs, shall be set down as "competents," and those who are uneducated, or unqualified in other respects to prudently manage their affairs, or who are of idle, wandering, or dissolute habits, and all orphans, shall be set down as "those not so competent."

The United States agrees to issue patents to all persons entitled to selections under this treaty, as follows, viz: To those belonging to the class denominated "competents," patents shall be issued in fee simple, but to those belonging

to the class of "those not so competent," the patent shall contain a provision that the land shall never be sold or alienated to any person or persons whomsoever, without the consent of the Secretary of the Interior for the time being.

(2)

No. 97-14

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

STATE OF MICHIGAN, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent,

-and-

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN,

Intervenor-Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR INTERVENOR-RESPONDENT

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31pp

QUESTION PRESENTED

In 1871, a parcel of land withdrawn and set aside for the Tribe by the Treaty of October 18, 1864, was allotted to a member of the Tribe under the terms of the treaty and patented in fee. In 1987, the land was reacquired by the Tribe in unrestricted fee simple status.

Does the relevant allotment language of the 1864 Treaty evince an unmistakably clear intention to authorize the State to impose its ad valorem real property tax on the Tribe or its land?

PARTIES TO THE PROCEEDINGS

Intervenor-Respondent Saginaw Chippewa Indian Tribe of Michigan adopts and incorporates petitioners' list of parties.

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Intervenor-Respondent Saginaw Chippewa Indian Tribe of Michigan ("Tribe") respectfully requests the Court to deny the Petition for Writ of Certiorari.

OPINIONS BELOW

The Tribe adopts and incorporates petitioners' list of opinions below.

STATEMENT OF JURISDICTION

The Tribe does not disagree with petitioners' jurisdictional statement.

TREATY AND STATUTORY PROVISIONS

The Tribe incorporates petitioners' list of treaty and statutory provisions and adds the following, which are reproduced in the Appendices hereto:

1. Executive Order of May 14, 1855, *reprinted in* I Charles J. Kappler, *Indian Affairs, Laws & Treaties* (1904), at 846-47. Opp. App. at 1a.

2. Article II of the October 18, 1864, Treaty with the Chippewa Indians of Saginaw, Swan Creek, and Black River, 14 Stat. 657 (1864). Opp. App. at 5a.

STATEMENT OF THE CASE

I. Introduction

The Tribe disagrees with petitioners' statement of the case. Pet. at 4-8. The Tribe adopts the Court of Appeals' description of the case as it appears at 106 F.3d 130, 131-32 (6th Cir. 1997), Pet. App. at 2a-4a.

II. The Present Dispute.

The Tribe agrees with petitioners' description of the present dispute, Pet. at 9, but wishes to emphasize that the parcel of land at issue here was part of an original allotment to James Gruette, a "competent" Indian, and that the land was patented to James Gruette on May 27, 1871, in conformity with the provisions of the third article of the Treaty of October 18, 1864, six years before Congress enacted the General Allotment Act. *See* Pet. App. at 60a-62a.

After acquiring the property, the Tribe asserted, not only by virtue of its ownership, but also by virtue of the Tribe's sovereign status as a federally recognized Indian tribe, that the Tribe and its property are exempt from state property taxes.

III. Proceedings Below.

The Tribe accepts the petitioners' description of the proceedings below. Pet. at 9-11.

The district court determined that the legal status of the Tribe's Isabella Reservation would not affect the outcome of the tax question and declined to address the issue. The district court also declined to address the issue raised by the City of Mt. Pleasant of the continued existence and status of the Tribe. All parties, other than the City of Mt. Pleasant, generally agreed that the Tribe currently exists as an Indian tribe. *See* Pet. at 8 n.3. The Reservation status and tribal existence issues were again argued by the parties before the court of appeals. The court of appeals remanded for further proceedings to include adjudication of the petitioners' claims that the land at issue is not reservation land and that the Tribe has been "dissolved." *United States v. Michigan*, 106 F.3d 130, 135 (6th Cir. 1997), Pet. App. at 10a. This remand of key issues is important to the Tribe's argument

here that it is premature for this Court to address the tax question and that the Court should deny the petition.

SUMMARY OF ARGUMENT

No compelling reason exists for this Court to grant discretionary review under the standards of Supreme Court Rule 10. The Petition for Writ of Certiorari should be denied because the decision of the court of appeals was grounded upon the express allotment language of the 1855 and 1864 treaties and the absence of unmistakably clear language permitting state taxation. Thus, the decision correctly interprets and follows this Court's opinion in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation,* 502 U.S. 251 (1992). Every appeals court after *Yakima Nation* except one that has addressed the taxation question presented here has correctly applied the rule of this Court in *Yakima Nation* and held that states are without authority to tax reservation lands or reservation Indians unless Congress' intent to authorize taxation is made unmistakably clear. Finally, it is premature for this Court to review the taxation question because the issues of the status of the Isabella Reservation and the Tribe's status as a sovereign tribal entity are pending before the district court on remand from the court of appeals. This Court should refrain from addressing the tax issue in a vacuum upon hypothetical or disputed factual premises.

I.

THE FACTS ARE UNIQUE TO THIS CASE, AND DISCRETIONARY REVIEW BY THIS COURT IS UNNECESSARY.

This case is not appropriate for review under Supreme Court Rule 10. The decision of the court of appeals was grounded upon the express allotment language of the 1855 and 1864

treaties between the Tribe and the United States and the absence of unmistakably clear language permitting state taxation. *United States v. Michigan*, 106 F.3d at 132, Pet. App. at 3a. *See County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 258 (1992) ("*Yakima Nation*"). The outcome of this case is of little importance to the interpretation of other treaties or statutes involving other Indian tribes and other Indian reservations. It is therefore not a case of national federal importance.

Petitioners' asserted conflict between the circuits is neither as direct as petitioners' claim nor as immediate as they imply. Pet. at 14. The decisions of the courts of appeal in *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994) ("*Lummi*"); *Leech Lake Band of Chippewa Indians v. Cass County*, 108 F.3d 820 (8th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3137 (U.S. July 8, 1997) (No. 97-174) ("*Leech Lake*"); and the instant case involved specific facts and unique provisions of treaties and acts of Congress that are of importance only to those cases and the circumstances presented there. Neither the Ninth Circuit nor the Eighth Circuit were called upon to construe this Tribe's Treaty of October 18, 1864, 14 Stat. 657 (1864), which is of paramount importance in this case. Because different statutes and treaties are involved, there is no real conflict between the decisions of the Sixth and Eighth Circuits and the decision of the Ninth Circuit that would invoke this Court's discretionary review power.

Yakima Nation teaches that each case must stand on its own facts. Yet petitioners assume that if treaty allotments are involved in one case, then *all* treaty tax matters should be governed by that case's opinion. However, it is not the vehicle the United States uses, whether statute, treaty or executive order, that determines the nature of the right created, it is the terms of the

instrument itself. Petitioners also assume that all treaty allotments have the same status. For instance, petitioners assert that *Lummi* involved land allotted and patented "under the provisions of a treaty." Pet. at 14. It was not *a* treaty, it was the Treaty of Point Elliott, 12 Stat. 927 (1855). *Lummi*, 5 F.3d 1355, 1356. Similarly, *Leech Lake* involved interpretation of the Nelson Act of 1889, ch. 24, 25 Stat. 642 (1889). *Leech Lake*, 108 F.3d 820, 829.

II.

THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S DECISION IN *YAKIMA NATION* AND OTHER DECISIONS AFTER *YAKIMA NATION*.

A. The Decision in *Yakima Nation*.

This Court takes a categorical approach to state taxation of reservation lands and reservation Indians. In *Yakima Nation*, the Court reiterated the rule that " '[A]bsent cession of jurisdiction or other federal statutes permitting it,' we have held, a State is without power to tax reservation lands and reservation Indians. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)." *Yakima Nation*, 502 U.S. at 258. The Court continued: "And our cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has 'made its intention to do so unmistakably clear.' *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985); *see also California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215, n.17 (1987)." *Id.* The Court has not swayed from the categorical approach to the special area of state taxation of Indians since *Yakima Nation*. *E.g.*, *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995); *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1993).

Yakima Nation hinged on the clearly manifested intention of Congress to permit the state tax, which the Court found in § 6 of the General Allotment Act, 24 Stat. 388, 389 (1887), *as amended* 34 Stat. 182 (1906), *codified at* 25 U.S.C. § 349. That section provides, in part, "*and thereafter* [after issuance of a patent in fee simple] *all restrictions as to sale, incumbrance, or taxation of said land shall be removed . . .*" *Yakima Nation*, 502 U.S. at 258 n.1 (emphasis in original); Pet. App. at 54a.

Thus, after *Yakima Nation*, whether Indian-owned fee land within Indian country is subject to state taxation depends upon whether the land passed out of trust under the authority of the General Allotment Act or some other authority by which Congress has expressly authorized state jurisdiction and state taxation. *United States v. Michigan*, 106 F.3d 130, 133-34 (6th Cir. 1997), Pet. App. at 6a-7a. In this case the treaty makes no reference to authorizing state taxation or jurisdiction.

Contrary to petitioners' claim, the Court in *Yakima Nation* did not suggest that the Court intended later to address land allotted under treaties or statutes other than the General Allotment Act. Pet. at 14. All that was left unresolved was a determination of whether other statutes applied to the lands in *Yakima Nation*. The legal rule to be applied had already been established in *Yakima Nation*. If alienability alone were the test, it is difficult, if not impossible, to explain the terms of the remand in *Yakima Nation*. "If alienability equaled taxability it should not have mattered under which act the land was made alienable. . . ." *Leech Lake*, 108 F.3d at 826.

B. Decisions Following *Yakima Nation*.

In *Lummi*, 5 F.3d 1355 (9th Cir. 1993), the Ninth Circuit addressed the question whether tribally owned fee land that was originally allotted pursuant to the Treaty of Point Elliott, 12

Stat. 927 (1855). The court misread *Yakima Nation* as equating alienability with taxability without examining the specific treaty language at issue in the case. *Lummi* was a two-to-one decision of the panel. Rehearing *en banc* was denied. 5 F.3d at 1360. Judge Beezer's dissent invoked the categorical exemption analysis applied by this Court in *Yakima Nation* and refuted the majority's interpretation of *Yakima Nation*. *Lummi*, 5 F.3d at 1359-60 (Beezer, J., dissenting).

Since 1993, the *Lummi* decision has remained an aberration. Every appeals court that has addressed the taxability of Indian land has rejected *Lummi* and has correctly interpreted and applied the holding of *Yakima Nation* that categorically bars state taxation of Indians or their property within Indian country absent the express consent of Congress.

In *Southern Ute Indian Tribe v. Bd. of County Commr's*, 855 F. Supp. 1194 (D. Colo. 1994), *judgment vacated, appeal dismissed*, 61 F.3d 916 (10th Cir. 1995) (unpublished table decision) ("*Southern Ute*"), the district court rejected the majority decision in *Lummi* and followed Judge Beezer's dissent, noting that if alienability were the only test for taxability, the Court in *Yakima Nation* would not have left open the question whether patenting under an act other than the General Allotment Act would require a different result. *Southern Ute*, 855 F. Supp. at 1200; *Yakima Nation*, 502 U.S. at 270. On appeal, the Tenth Circuit agreed with the district court that "[d]ifferences in the manner in which certain parcels were originally patented may affect whether they are taxable today." *Southern Ute*, 1995 WL 427683, at *2 (10th Cir. 1995), Opp. App. at 9a.

In the instant case, the district court rejected the reasoning of *Southern Ute* and followed *Lummi*. *United States v. Michigan*, 882 F. Supp. 659, 668-72 (E.D. Mich. 1995), *rev'd*, 106 F.3d 130 (6th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3085

(U.S. June 30, 1997) (No. 97-14), Pet. App. at 23a-29a. The district court's misinterpretation of *Yakima Nation* was corrected by the Court of Appeals. *United States v. Michigan*, 106 F.3d at 132-34, Pet. App. at 4a-7a.

In *Leech Lake*, the district court followed the decision in *Lummi. Leech Lake Band of Chippewa Indians v. Cass County*, 908 F. Supp. 689 (D. Minn. 1995), *aff'd in part, rev'd in part*, 108 F.3d 820 (8th Cir. 1997). The Eighth Circuit Court of Appeals reversed. The court followed *Yakima Nation* and held that tribal fee lands that had been alienated under sections of the Nelson Act that did not incorporate the General Allotment Act are not subject to state tax. *Leech Lake*, 108 F.3d at 829-30.

In *In re Kaul*, 261 Kan. 755, 933 P.2d 717 (1997), the Supreme Court of Kansas reviewed the Ninth Circuit decision in *Lummi* and the district court decisions in *United States v. Michigan*, *Leech Lake* and *Southern Ute*. At the time, the Kansas court did not have the benefit of the Sixth Circuit decision in *United States v. Michigan* or the Eighth Circuit decision in *Leech Lake*. Nevertheless, the court was persuaded by the district court decision in *Southern Ute* and Judge Beezer's dissent in *Lummi* and concluded that "[u]nder the Supreme Court's decision in *Yakima*, alienability of the land is not the sole test for the imposition of ad valorem tax upon Kaul's property." 261 Kan. at 775, 933 P.2d at 730. Express congressional intent to allow state taxation must be found. *Id.* The court remanded the case for additional factual findings on the source of the fee patents and the propriety of state taxation in light of the treaties between the Tribe and the United States and this Court's decision in *Yakima Nation*. *Id.*

The Court should deny the petition. The Sixth Circuit decision, which correctly interprets *Yakima Nation* and other precedents of this Court, should be allowed to stand. Federal

and state courts should be allowed further opportunity to build upon the existing body of case law that correctly follows this Court's precedents. The decision of the Ninth Circuit panel in *Lummi* does not create an immediate or permanent bar to national consistency on the issue of state authority to tax Indians or their property. Any conflict that might exist between the Ninth Circuit and the Sixth Circuit will likely be resolved without this Court's intervention.

All other federal courts of appeal and at least one state court have rejected *Lummi*'s misreading of *Yakima Nation* and some of the statements of the Ninth Circuit decision. Disagreement between the circuits may disappear. The Ninth Circuit may, on its own, reconsider its approach in *Lummi*. There is no compelling reason or immediate need for this Court to grant the petition and burden itself with factually intricate issues while state and federal courts continue appropriately to address the issue.

III.

IT IS PREMATURE FOR THIS COURT TO REVIEW THE DECISION BELOW BECAUSE TWO KEY ISSUES MUST FIRST BE RESOLVED ON REMAND.

Another reason why this Court should deny the petition is that the key issues of Reservation status and tribal recognition have not yet been decided, and it is premature for this Court to grant review while those issues remain subject to the court of appeals' remand order. The district court below declined to address the questions of reservation or tribal status believing them to be irrelevant to the authority to tax. *United States v. Michigan*, 882 F. Supp. at 663, Pet. App. at 14a-15a. However, taxability here depends, in the first instance, on whether or not the property is located within an Indian reservation or within

Indian country. *E.g., Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991). The district court below correctly observed that application of *Yakima Nation* rests "on the implicit postulate that the lands involved here are 'reservation lands.' " *United States v. Michigan*, 882 F. Supp. at 665, Pet. App. at 18a. Likewise, whether the landowner is a federally recognized tribal entity is crucial to the tax question.

Although the Tribe and the petitioners urged the court of appeals to address the status of the Isabella Reservation, the court expressed no opinion but remanded the case to the district court for resolution of the petitioners' claim that the land at issue is not reservation land and that the Tribe has been dissolved. A scheduling conference was called by the district court on August 25, 1997, and a scheduling order on remand is forthcoming.

This Court should refrain from addressing the tax issue in a vacuum before the district court and the court of appeals have determined whether the land at issue is within the Tribe's Reservation or Indian country and whether the Tribe continues to exist as a sovereign tribal entity. For the Court to address the petition now will not resolve the entire dispute between the parties, and it is premature to address the tax issue upon hypothetical or disputed factual premises.

CONCLUSION

This case involves facts and issues unique to this Tribe and the petitioners. An irreconcilable conflict among the circuits does not exist. All but one appellate court has correctly applied this Court's decision in *Yakima Nation*. It would be premature for this Court to address the tax issue before the district court remand is completed. In the absence of any compelling reason for this Court to grant the petition, this Court should exercise its judicial discretion and deny the petition for writ of certiorari.

September 2, 1997

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APPENDIX A — EXECUTIVE ORDER OF MAY 14, 1855. I KAPPLER 846-47

MICHIGAN.

Isabella Reserve.

[In Mackinac Agency; occupied by Chippewa of Saginaw, Swan Creek, and Black River; Area 3 3/4 square miles; established by Executive order and treaties of August 2,1855, and October 18, 1864.]

Department of the Interior,
Office of Indian Affairs, December 11, 1854.

Sir: I inclose a copy of a letter from Messrs. George Smith and P. O. Johnson, missionaries of the Methodist Episcopal Church in Michigan, addressed to Rev. Dr. Durbin, and by him forwarded to this office, in relation to certain desired reservations of public lands.

In consideration of certain contemplated arrangements with the Indians in Michigan during the ensuing spring, I have to ask that you reserve from public sale the lands designated in the letter of Messrs. Smith and Johnson.

I have also received a communication from the Rev. J. P. Durbin, corresponding secretary of the Missionary Society of the Methodist Episcopal Church, asking for an additional reservation of lands near Iroquois Point, back from the lake.

For the reasons above, I concur in the request, and ask that several additional sections to those already reserved be made of the lands in the vicinity of Iroquois Point.

Very respectfully, your obedient servant,
Geo. W. Manypenny, *Commissioner.*

John Wilson, Esq.,
Commissioner of General Land Office.

General Land Office, *December 20, 1854.*

Sir: I have the honor to transmit a communication from the Commissioner of Indian Affairs, addressed to this office, bearing date the 11th instant, and its inclosure, recommending, for reasons stated, the withdrawal from market and reservation for Indian purposes the lands in Isabella County, Mich., or so much thereof as may be deemed expedient.

The pink-shaded lines on the inclosed printed map show the limits of Isabella County, covering, according to the maps of this office, townships 13, 14, 15, and 16 north, of ranges 3, 4, 5, and 6 west of the Michigan meridian, in the Ionia district, the whole of which are requested to be reserved, and the numbers 1, 2, 3, 4, 5, 6, placed on certain townships, show the order of the preference to be given should it be determined to reserve less than the east half of the county.

From an estimate just made at this office, it appears that only about two-ninths of the whole surface has been disposed of, although three of the townships have been in market since 1833, and the balance since 1840.

As regards the conditions mentioned in the Rev. George Smith's letter (among the papers), that the reserve be made "for the Chippewa Indians of Michigan, to be purchased under the direction of the missionary society," etc., I have to remark that

no such privilege could, in my opinion, be given without legislation of Congress.

I am, very respectfully, your obedient servant,
John Wilson, *Commissioner.*

Hon. Robert McClelland,
Secretary of the Interior.

Department of the Interior, *April 12, 1855.*

Sir: I have the honor to submit herewith two letters from the Commissioner of the General Land Office in relation to the withdrawal of certain lands in Michigan from sale with a view to the benefit hereafter of certain Indian tribes, in accordance with the intimations of the Indian Office.

The first letter, that of the 20th of December last, has reference to lands in Isabella County, Michigan, and that on the 10th instant to land in a new county called Emmett, in the same State, the former county containing 16 and the latter 27 townships and fractional townships, and the withdrawal appears to be desired by the Indian Office "in consequence of certain contemplated arrangements with the Indians in Michigan during the present spring." The matter connected with the letter of the 20th December has been delayed, waiting more specific information from the Indian Office as to the specific land wanted, which is supplied by this letter of the 10th instant from that office.

The philanthropic policy of furnishing these Indians, who are desirous of becoming cultivators of the soil, with land for that purpose, to the greatest possible extent separated from evil

example or annoyance of unprincipled whites, who might be disposed to settle in their vicinity, or within their midst, after farms already opened by them had rendered the surrounding land more valuable, is apparent, and I have no hesitation in recommending your sanction to the withdrawal of the lands indicated in each of said communications from the Land Office, but it must be with the express understanding that no peculiar or exclusive claim to any of the land so withdrawn can be acquired by said Indians, for whose future benefit it is understood to be made, until after they shall by future legislation be invested with the legal title thereto.

With much respect, your obedient servant,

R. McClelland, *Secretary.*

The PRESIDENT OF THE UNITED STATES.

[Indorsement.]

May 14, 1855.

Let the withdrawal of all the vacant land in Isabella County be made with the express understanding contained in the letter of the Secretary of the Interior to me of the 12th instant.

Franklin Pierce.

(Superseded by treaty of August 2, 1855, with Chippewas of Saginaw, Swan Creek, and Black River, 11 Statutes, 633.)

APPENDIX B — ARTICLE II, TREATY WITH THE CHIPPEWA INDIANS. OCTOBER 18, 1964. 14 STAT. 657

ARTICLE II. In consideration of the foregoing relinquishments, the United States hereby agree to set apart for the exclusive use, ownership, and occupancy of the said *of the said* Chippewas of Saginaw, Swan Creek, and Black River, all of the unsold lands within the six townships in Isabella county, reserved to said Indians by the treaty of August 2d, 1855, aforesaid, and designated as follows, viz: —

The north half of township fourteen, and townships fifteen and sixteen north, of range three west; the north half of township fourteen and township fifteen north, of range four west, and townships fourteen and fifteen north, of range five west.

APPENDIX C — UNPUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, 1995 WL 427683 (JULY 20, 1995)

SOUTHERN UTE INDIAN TRIBE, doing business as Red Willow Production Company, Plaintiff-Appellee,

v.

LA PLATA COUNTY, Board of County Commissioners, State of Colorado; Fred Klatt, Shirley M. Baty, Frank Joswick, Commissioners of La Plata County, Colorado; Ed Murray, Treasurer of La Plata County, Colorado; Craig Larson, Assessor of La Plata County, Colorado; Colorado, State of; Revenue, State of Colorado, Department of; Renny Fagan, Executive Director of Department of Revenue, State of Colorado; Oil and Gas Conservation Commission of the State of Colorado; Susan Mccannon, acting Director of the Oil & Gas Conservation Commission, State of Colorado; Property Taxation, State of Colorado, Division of; Mary Huddleston, Property Tax Administration for the State of Colorado, Defendants-Appellants.

State of California; State of South Dakota; State of Utah; State of North Dakota; Saginaw Chippewa Indian Tribe of Michigan; Shoshone and Northern Arapaho Tribes of the Wind River Reservation; Council of Energy Resource Tribes; Jicarilla Apache Tribe; Ute Indian Tribe of the Uintah and Ouray Reservation; Native Village of Karluk; the Rosebud Sioux Tribe; the Confederated Tribes of the Umatilla Indian Reservation; the Crow Tribe of Indians; the Oglala Sioux Tribe; Yakama Indian Nation, Amici Curiae.

No. 94-1310.

United States Court of Appeals, Tenth Circuit.

July 20, 1995.

Appendix C

Before KELLY, SETH, and HENRY, Circuit Judges.

ORDER AND JUDGMENT*

*1 This appeal is brought by the Board of County Commissioners of La Plata County, the State of Colorado and various officials of those parties. It challenges the district court's grant of summary judgment to the Southern Ute Indian Tribe. Because this is a final decision of the United States District Court for the District of Colorado, our jurisdiction is proper under 28 U.S.C. 1291.

The Southern Ute Indian Tribe initiated this action requesting a declaratory judgment that it is exempt or immune from the imposition of ad valorem taxes on lands and mineral interests held by the Tribe or tribal enterprises within its reservation boundaries. The Tribe's Complaint thus broadly encompasses any property meeting the above stated criteria. The incident which appears to have precipitated the Tribe's claim at this time was the potential taxation of property acquired by the Tribe's business enterprise, Red Willow Production Company, from Conoco, Inc. about January 15, 1993. Ad valorem taxes for 1992, the year prior to the Tribe's ownership of the property acquired from Conoco, were assessed against Conoco and subsequently paid by Conoco. By this payment by Conoco of the assessment the issue as to this tract became moot, and we are left only with general assertions as to real property and personal property without descriptions.

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

Appendix C

The basic Claim for Relief in the Complaint stated that the Tribe seeks: "Preliminary and permanent injunctive relief against Defendants prohibiting them from: "(a) Seeking to collect any state or local taxes on real or personal property, including mineral interests, royalty interests, working interests, oil and gas wells, and oil and gas equipment owned by the Tribe located within the boundaries of the Southern Ute Indian Reservation." Pending its determination regarding the merits of the Tribe's claim, the district court granted a preliminary injunction barring the County or State from taxing or otherwise attaching or encumbering Southern Ute owned property or proceeds derived therefrom.

After expressing concern regarding the ripeness of the Tribe's claim, the district court nevertheless addressed the merits of the action. The court then held that the County and State, absent Congressional action, "may not directly tax real property interests held by the Tribe in fee simple nor may the County and State tax mineral interests owned by the Tribe relating to lands within the boundaries of the Reservation."

The trial court's concern was expressed as follows: "My initial concern with this case is ripeness. The only taxes which have actually been assessed are those concerning the property the Tribe acquired from Conoco, Inc., a former third-party defendant. Conoco paid those taxes, leading the County and State to move for dissolution of the preliminary injunction. I denied that motion, holding it was clear that the Defendants sought to impose taxes on any property held by the Tribe in fee, as evidenced by their argument on summary judgment."

***2** It is the issue of ripeness raised initially by the district court with which we are first concerned. Although this question is not expressly raised in the issues presented to this court, "when

a ripeness question in a particular case is prudential, we may raise it on our own motion[.]" Reno v. Catholic Social Services, Inc., __ U.S. __, 113 S.Ct. 2485, 2496 n. 18. Even though a dispute may exist, if it has not developed factually to present a definitive issue upon which a court can act, the doctrine of ripeness applies which requires that federal courts decline to then decide those issues which are not yet fit for adjudication. Regional Rail Reorganization Act Cases, 419 U.S. 102, 138. This doctrine concerns prudential reasons for refusing to exercise jurisdiction. Buckley v. Valeo, 424 U.S. 1, 114. A federal court cannot render a decision which is merely advisory. See Poe v. Ullman, 367 U.S. 497; CSG Exploration Company v. Federal Energy Regulatory Commission, 930 F.2d 1477, 1482 (10th Cir.).

As mentioned by the trial court, no assessment of property of the Tribe has been made except the former Conoco property, and that issue is moot. An assessment is the prerequisite to "taxation" and none has been made to create the issues sought to be litigated. Neither the Complaint nor the record describes any particular piece of property concerned. We have only a general claim that taxation would be improper.

We agree with the trial court's statement: "Differences in the manner in which certain parcels were originally patented may affect whether they are taxable today. For example, property originally patented by homesteaders under early laws dealing with the Ute Indians may require different tax treatment than property patented by individual Indian allottees under those same laws. Furthermore, the Tribe itself has not been clear as to whether any property it now owns in fee falls within the latter category. Finally, it is not clear, with respect to the Tribe's ownership of certain forms of mineral interests, whether the surface rights are held in trust or in fee and by whom. Therefore,

without more specific information on the type of property sought to be taxed, my treatment of these motions is necessarily general."

A review of the Southern Ute Complaint further demonstrates the problem. The Complaint states that "[t]he County of La Plata . . . has threatened to impose ad valorem taxes upon the mineral interests and equipment acquired by the Tribe", and further alleges that "[t]he State of Colorado . . . has threatened to impose taxes . . . upon the Tribe associated with the Tribe's operations on land within the Southern Ute Indian Reservation." (Emphasis added.) The threat of imposed taxes does not supply the finality necessary to a determination that a claim is fit for judicial review. See Abbott Laboratories v. Gardner, 387 U.S. 136 (a ripeness determination depends upon the fitness of an issue for judicial resolution and the hardship to the parties of withholding judicial consideration). See also Sierra Club v. Yeutter, 911 F.2d 1405, 1417 (10th Cir.). Further, we conclude that delaying consideration until such time as there is an actual assessment does not impose a hardship on the parties. Abbott Laboratories, 387 U.S. at 149.

*3 Accordingly, we must hold that this action is not ripe for adjudication. There has been no action taken by the Appellants herein which has been "felt in a concrete way by the challenging part[y]." Abbott Laboratories, 387 U.S. at 148-49.

We therefore conclude that the district court erred in granting summary judgment. Accordingly, we DISMISS this appeal, and REMAND with directions to VACATE the previous judgment of the district court, and dismiss the Complaint without prejudice.

IT IS SO ORDERED.

Appendix C

HENRY, Circuit Judge, dissenting.

The majority's conclusion is well-stated and thoroughly defensible. Though the district court was also concerned with ripeness, I believe it made the correct decision to reach as many issues as it could both for the sake of efficiency and because of the nature of the parties and the "legislative confusion" in this area. See Memorandum Opinion and Order, Brief of County Appellants, Attachment A, at 2-3. I do not, therefore, agree with the majority's conclusion that the issues in this case are not ripe for adjudication.

In my opinion, the fact that state and county officials have threatened to impose ad valorem taxes and various mineral taxes on non-trust fee lands is sufficient to establish the ripeness of the dispute. " "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." "Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 581-82 (1985) (quoting Regional Rail Reorganization Act Cases, 419 U.S. 102, 143 (1974) (quoting Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923))).

I view this case as analogous to Crow Tribe of Indians v. Montana, 819 F.2d 895 (9th Cir.1987), aff'd, 484 U.S. 997 (1988). There, the district court concluded, inter alia, that the application of state severance and gross proceeds taxes to coal mined within the boundaries of a reservation was not ripe for adjudication because no mining had occurred there. The Ninth Circuit reversed, concluding that "[t]he Tribe need not wait for mining to commence to challenge the taxes' application to coal mined within the Reservation boundaries. . . . The taxes are already in effect and Montana intends to apply them to this coal." Id. at 903.

I think the same is true here. The appellees intend to apply ad valorem taxes and certain taxes on minerals to non-trust lands held in fee by the Tribe within the boundaries of the Ute Reservation. The Tribe has sought prospective relief to prevent this taxation. Moreover, the applicable law has been analyzed by the district court, the parties, and numerous amici curiae.

I do agree with the district court's observation that the parties have discussed some of the issues in a very general way. I think this is particularly true of some of the mineral taxes and that, as to some issues concerning mineral taxation, further analysis might reveal that the current record is insufficient to make the necessary determinations as to whether these taxes are proper within reservation boundaries. Nevertheless, I believe that the dispute is concrete enough on a number of the issues and that, given the time and effort expended by the parties, the district court, and this court, we should proceed to the merits of as many issues as possible.

*4 Accordingly, I respectfully DISSENT.

No. 97-14

Supreme Court, U.S.
FILED
AUG 29 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF MICHIGAN, *et al.*,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent,
and
SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN,
Intervenor-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR LEWIS COUNTY, IDAHO; MAHNOMEN COUNTY, MINNESOTA; LAKE COUNTY, MONTANA; LYMAN COUNTY AND TODD COUNTY, SOUTH DAKOTA; DUCHESNE COUNTY AND UINTAH COUNTY, UTAH; *AMICI CURIAE*, IN SUPPORT OF PETITIONERS, STATE OF MICHIGAN, *ET AL.*

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> Thus, if the Court agrees with the position of *either* party in this case, its legal ruling would be *dispositive* of this and other *pending* and *future cases*, and therefore would *obviate the need for potentially protracted and complex litigation* regarding the impact of real estate taxes on a case-by-case basis . . . we urge the Court to grant review now . . . and thereby to resolve a question of recurring importance on Indian reservations.

Brief for the United States as *Amicus Curiae* at 8, *Yakima County v. Yakima Indian Nation*, 502 U.S. 251 (1992) (Nos. 90-408, 90-577) (emphasis added).

By Order of January 7, 1991, this Court invited the Solicitor General to file a brief expressing the views of the United States in *Yakima County v. Yakima Indian Nation*, 502 U.S. 251 (1992). In response, the United States urged this Court to grant review for the broad policy reasons noted in the above quotation.[2] After this Court granted the petition, the United States, of course, sup-

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[1] The text of this *amici curiae* brief of the Counties is submitted in both *Leech Lake Band of Chippewa Indians v. Cass Co., Minnesota*, 108 F.3d 820 (8th Cir. 1997) *petition for cert. filed* (U.S. July 8, 1997) (No. 97-174) and in *United States v. Michigan*, 106 F.3d 130 (6th Cir. 1997) *petition for cert. filed* (U.S. June 30, 1997) No. 97-14). In both instances, the opinions of the district courts more accurately reflect the views expressed in *Yakima County v. Yakima Indian Nation*, 502 U.S. 251 (1992). *United States v. Michigan*, 882 F. Supp. 659 (E.D. Mich. 1995), *Leech Lake Band of Chippewa Indians v. Cass Co., Minn.*, 908 F. Supp. 689 (D. Minn. 1995).

[2] Earlier, the United States repeatedly told the Ninth Circuit Court of Appeals the same thing:

> The issue is important.—The issue is of *great importance* to Indians on reservations *throughout* the United States . . . applies to the *vast majority* of Indian reservations in the United States. . . The *broad importance* of the decision to reservation Indians. . . .

Memorandum for the United States as *Amicus Curiae* in Support of Petition for Rehearing and Suggestion for Rehearing *En Banc* at 1, 2, *Yakima*, 960 F.2d 793 (No. 88-3926) (emphasis added).

ported the position of the Indian tribes and, on the merits, their views were squarely rejected.

Contrary to the express representation to this Court, the United States then proceeded, as a party or as *amicus curiae* in other cases across the country, to continue to support additional litigation of this kind. In these cases, the United States maintained that *Yakima* should be *narrowly* construed and *severely* restricted in application. As a result, the concerns that prompted the filing of the *amici curiae* brief by the Counties in the *Yakima* case have only been exacerbated.

> The tax records in county court houses are being rifled. Since 1987, tribal governments across the country, with the assistance and encouragement of the United States, have challenged the validity of county ad valorem taxes on Indian fee lands . . . As a result, members of tribes have refused to pay their taxes . . . tax abatement petitions have been filed . . . individual lawsuits have been filed against counties in State courts . . . tribal lawsuits have been filed against counties in federal courts . . . and even worse, the United States, just a year ago, after the decision below, targeted one *Amici* county and sued the county and the State in federal court in the name of the United States. . . . (Federal complaint with attachments; one inch thick, burdensome interrogatories and requests for production of documents). Apart from the fact that county governments can ill afford to squander scarce resources on senseless litigation, the issue here threatens the very core of county fiscal integrity.

Brief for La Plata County, Colorado, et al. as *Amicus Curiae* in Support of Petitioners at 1, *Yakima* (Nos. 90-408, 90-577).

As in *Yakima*, the Counties joining in this Brief all contain areas that at one time were established as Indian reservations. They are representative of many other counties similarly situated throughout the United States. As this Court has often noted, fee lands are scattered through-

out the counties, some of which are owned by Indians and Indian tribes. The history of each area is, of course, as varied and diverse as federal Indian policy—with one exception. Historically, every county has routinely taxed these fee lands and this practice has been the accepted rule for decades.

To be sure, the extent of Indian fee ownership varies from reservation to reservation and reflects radically different fact situations. Locally, tribal enrollment lists are not ordinarily available to county governments and even these lists do not include non-member Indians, who also own fee property. So we are not certain of the total sum involved. One thing, however, is certain. The amount is substantial—because these counties also contain large areas of other lands that are non-taxable and held in trust by the United States for Indians and Indian tribes. For example, in one county, approximately 60 percent of the entire county is held in trust by the United States for the tribe or its members or other Indians. Of the taxable land, Indian fee land on paper roughly constitutes more than 15 percent of the seven hundred and fifty thousand ($750,000) to eight hundred and fifty thousand ($850,000) dollars of total taxes collected by the county per year in recent years. In another county, the same figure represents roughly 8 percent of the total taxes collected. In other counties the percentage could be more and in some counties it is undoubtedly less. But the exact percentage is beside the point. Whatever the amount, county government in these areas is not some new and novel experience. It has been there for decades pursuant to Congressional Policy. That Congressional Policy has authorized the taxes here—and not simply on a restricted case by case basis, as two out of the three courts of appeals have indicated.

The issue in these cases represents a fundamental and most basic concept in federal Indian law that has been resolved and relied on for decades. For this additional reason, the Counties respectfully submit that this Court grant the petitions for writs of certiorari in both *Leech*

Lake Band of Chippewa Indians v. Cass Co., Minnesota, 108 F.3d 820 (8th Cir. 1997) *petition for cert. filed* (U.S. July 8, 1997) (No. 97-174) and in *United States v. Michigan,* 106 F.3d 130 (6th Cir. 1997) *petition for cert. filed* (U.S. June 30, 1997) (No. 97-14).

REASONS FOR GRANTING THE PETITIONS

I. THE OPINIONS OF THE COURTS OF APPEALS ARE CONTRARY TO A TRADITION OF TAXATION AND CONFLICT IN PRINCIPLE WITH THE RELEVANT DECISIONS OF THIS COURT.

The Counties fully support the reasons for granting the petitions set forth in the petitions and in the brief of supporting *amici curiae* States. The Counties recognize that the primary considerations governing review will focus on the conflict among the circuits and the conflict with the decision of this Court in *Yakima.* The Counties further submit that the decisions of the panels conflict substantially with other related decisions of this Court and a tradition of taxation. This brief will focus on that tradition and highlight those decisions.

A. Introduction.

In order to place the taxation of fee lands issue in historical context, one need first refer to the fact that until 1989, nearly everyone, including the United States, acted upon the recognition that such taxes were clearly permissible. The Counties have appended the opinion of the Associate Solicitor, Division of Indian Affairs, of the Department of the Interior Memorandum dated March 22, 1979. Co. App. 1a-3a.

In fact, this is the reason that the decisions below do not cite any other opinions that have reached the tax exempt conclusion. There are none. These decisions represent the first time any Courts of Appeals have ever held that ordinary fee lands owned by Indian tribes or their members are not taxable—not an insignificant point.

Again, the United States is, in large part, responsible for this radical departure from tradition and precedent.

For this reason, a few preliminary observations regarding the arguments the United States submitted below are in order. First, although the United States flaunts its "expertise in Indian law matters" (Brief for the United States at 1, *Leech Lake Band of Chippewa Indians v. Cass Co., Minn.*, 108 F.3d 820 (8th Cir. 1997) (No. 95-4263)), the United States never acknowledges that:

1. Most of the arguments relied upon by the United States have been just slightly revised from those submitted by the United States in *Yakima* and rejected by this Court.

2. No court of appeals had ever adopted the argument of the United States.

3. A century of agency opinions and congressional action detract from the argument of the United States.

4. A 1902 Congressional Resolution and a 1923 Act of Congress were passed to extend the scope of the General Allotment Act of 1887, 24 Stat. 388 (*see generally Stevens v. C. I. R.*, 452 F.2d 741 (9th Cir. 1971):

> Insofar as not otherwise specially provided, all allotments in severalty to Indians, outside of the Indian Territory, shall be made in conformity to the provisions of the Act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," and the other general Acts amendatory thereof or supplemental thereto, and shall be subject to all the restrictions and carry all the privileges incident to allotments made under said Act and other general Acts amendatory thereof or supplemental thereto.

Joint Resolution of June 19, 1902, 32 Stat. 744.

> That unless otherwise specifically provided, the provisions of the Act of February 8, 1887 (Twenty-fourth Statutes at Large, page 388), as amended, be, and they are hereby, extended to all lands heretofore

> purchased or which may hereafter be purchased by authority of Congress for the use or benefit of any individual or band or tribe of Indians.

Act of February 14, 1923, 42 Stat. 1246, 25 U.S.C. § 335.

5. Provisions in the Indian Reorganization Act of 1934, 48 Stat. 984, and related regulations at 25 C.F.R. 151 detract from the arguments of the United States.

6. The original edition of Felix Cohen's Handbook of Federal Indian Law at 258-261, undermines the arguments of the United States (this segment also undermines the Non-Intercourse Act argument that the United States again submits).

7. The 1982 Handbook of Federal Indian Law supports the United States, but that those arguments were submitted by the United States and rejected in *Yakima*.[3]

In other instances, the argument of the United States is seriously misleading. For example, the following "omission" assertion appears at page 29 in the brief the United States submitted in *Leech Lake*:

> *Yakima* did not, however, address the immunity enjoyed by tribally-owned land. This *omission* likely stems from the Court's primary focus on individual Indian ownership of fee lands in that case.

Brief for the United States at 19, *Leech Lake*, 108 F.3d 820 (No. 95-4263) (emphasis added).

The United States should know better. The "Question Presented" in the Brief for the United States in *Yakima* was carefully drafted in this respect:

> Whether Yakima County may impose its ad valorem tax on real property situated within the boundaries of the Yakima Indian Reservation that is owned in

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[3] The original Cohen text (and the subsequent revisions) have been viewed by some as tribal advocacy works. *See* Conference of Western Attorneys General. American Indian Law Deskbook at xiii-xv (1993).

> fee by the *Yakima Nation or individual members* of the Yakima Nation.

Brief for the Unied States as Amicus Curiae at I, *Yakima*, 502 U.S. 251 (Nos. 90-408, 90-577) (emphasis added).

Further, tribal ownership was discussed throughout the briefs and noted on four separate occasions in the text of the *Yakima* opinion. *Yakima*, 502 U.S. at 256, 264, n.4. *See also* Transcript of Oral Argument at 4, 18 and 28, *Yakima* (No. 90-408; 90-577).

Finally, at other times, the United States inadvertently undermines the position of the Leech Lake Band. For example, in this instance, the Leech Lake Band would like this Court to think that the Nelson Act was unusual and atypical in every respect. Respondent's Brief in Opposition, *Leech Lake*, 108 F.3d 820 (No. 95-4263). On the other hand, the United States routinely recognizes that:

> The Nelson Act, ch. 24, 25 Stat. 642, was one of a series of allotment acts passed by Congress after the passage of the General Allotment Act of 1887, 24 Stat. 388.

Brief for the United States at 2, *Leech Lake*, 108 F.3d 820 (No. 95-4263).

In this case, the United States is undoubtedly correct. For example, *see* the Great Sioux Act of 1889, 25 Stat. 896, where the General Allotment Act was, like the Nelson Act, simply tailored to the specific situation existing in the State at issue.

In short, the United States recognized early on in the *Yakima* litigation that the General Allotment Act was a statute of general applicability, amended on several occasions to further reflect its universal application, and in some instances, as in Minnesota, specifically incorporated by express reference in the text of related legislation dealing with allotments required by previous legislative formats. Accordingly, *Yakima* was thoroughly briefed on both sides in recognition of this fundamental understanding, with the United States (and 25 different tribes from

across the country) submitting dozens of arguments in their briefs to preclude the taxation of fee lands. As *Yakima* attests, this Court, with one dissent, rejected these ad valorem tax exemption claims.

While it is not necessary for any Opinion to address each and every argument that is not deemed persuasive, the assumption that this Court in *Yakima* did not address or consider all arguments of substance would be especially unwarranted in this instance. The United States and others filed *exhaustive* briefs detailing every conceivable argument in support of a tribal tax exemption on fee lands (including the *Goudy v. Meath*, 203 U.S. 146 (1906) has been overruled argument, the *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) argument, the 1934 Indian Reorganization Act argument, the 18 U.S.C. § 1151 Indian Country argument, *and* the 25 U.S.C. § 177 argument[4])—all of which were rejected. In *Yakima*, as in other recent cases, the position of the United States was simply tailored to support the arguments of Indian tribes. And this is the perspective from which the opinions of the courts of appeals that have adopted those arguments in these cases should be viewed.

B. The General Allotment Act Has Been Consistently Construed to Generally Authorize the Taxation of Fee Patent Land.

As we noted in *Yakima*, although this Court generally discussed the General Allotment Act in *Draper v. United States*, 140 U.S. 240 (1891), it was not until 1903 that a tax related issue reached this Court in *United States v. Rickert*, 188 U.S. 432 (1903). There, the United States correctly headed its argument with the proposition that "the lands of the Indian allottees are not taxable under

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[4] Immunity of Indian lands from state taxation and control is at the very core of federal Indian policy. *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1983); 25 U.S.C. § 177. Brief for the United States as *Amicus Curiae* at 12, *Yakima*. *See also Larkin v. Paugh*, 276 U.S. 431, 433-434 (1928).

the authority of the State *during* the trust period" and concluded that improvements were similarly "exempt from taxation *during* the trust period that the land is so exempt, such improvements being in legal contemplation land." Brief for the United States at 15, 42, *Rickert* (No. 216) (emphasis added). The *Rickert* opinion reflects this representation:

> [N]o power in the State of South Dakota, for state or municipal purposes, to assess and tax the lands in question *until* at least the fee was conveyed to the Indians. . . . *While* the title to the land remained in the United States, the permanent improvements, could no more be sold for local taxes than could the land to which they belonged.

Rickert, 188 U.S. at 437, 442 (emphasis added).

A few years later, in *Goudy v. Meath,* 203 U.S. 146 (1906), a related issue was generally discussed and decisively resolved. The *Goudy* alienation argument, addressed in detail by others, need not be repeated here.

In *United States v. Nice,* 241 U.S. 591 (1916), a case involving a federal prosecution for the sale of liquor to a tribal member with a 1902 trust patent, the United States only indirectly touched on this aspect of the General Allotment Act and the status of the individual:

> [C]ongress by this very act of 1887 expressly retained control over the allottee Indian's land *by restrictions of alienation and trusteeship*. . . . The State, having *no power to tax* these Indian [trust] allotments, had no particular interest in the Indian's welfare. . . . [I]t was well established that State laws relating to *taxation* of his [trust] property did not apply. . . .

Brief of the United States at 26, 21, 12, *Nice* (No. 681) (emphasis added).

The Court in *Nice* referred to this aspect of the General Allotment Act when it described the holding in *Rickert*:

> The act of 1887 came under consideration in *United States v. Rickert*, 188 U.S. 432, a case involving the power of the State of South Dakota to tax allottees under that act, according to the laws of the State, upon their allotments, the permanent improvements thereon and the horses, cattle and the other personal property issued to them by the United States and used on their [trust] allotments, and this court, after reviewing the provisions of the act and saying, p. 437, "These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition," held that the State was *without power to tax* the [trust] *lands* and other property, because the same were being held and used in carrying out a policy of the Government. . . .

Nice, 241 U.S. at 600-601 (emphasis added).

Two years later, the United States was more succinct when it argued another tax exemption issue in *United States v. McCurdy*, 246 U.S. 263 (1918):

> Partial emancipation from the Federal guardianship, accompanied by restricted ownership of land *for a limited period*, as a method of educating and preparing the Indians for the duties of civilized life, was adopted by Congress at an early date and has become a settled national policy. . . . In *United States v. Rickert*, 188 U.S. 432, it was decided that *trust* allotments and personal property issued to Indian allottees could not be taxed by a State because this would be "to tax an instrumentality employed by the United States for the benefit and control of this dependent race. . . ."

Brief for the United States at 9, 11, 12. *McCurdy* (No. 685) (emphasis added).

In *McCurdy*, the United States argued that land purchased with trust funds for an Osage Indian, as evidenced by a restrictive deed, should not be taxable by the State of Oklahoma. The *McCurdy* Opinion rejected the tax exemption argument of the United States in no uncertain

terms. At the same time, the Court clearly restated the basis of *Rickert*:

> There is also a *clear distinction* between the present case and those like *United States v. Rickert*, 188 U.S. 432, 23 Sup.Ct. 478, 47 L.Ed. 532, where it was sought to tax property, *the legal title of which was in the United States* and which was held by it for the benefit of Indians.

McCurdy, 246 U.S. at 272 (emphasis added). Nothing in *United States v. Nice*, was argued or cited by the United States and *Nice* did not figure in the Opinion of the Court in *McCurdy*, and correctly so.

A case more directly on point reached this Court in 1939. In *Board of Comm'rs of Jackson County, Kansas v. United States*, 308 U.S. 343 (1939), the United States equated a General Allotment Act trust patent with the exemption from taxation:

> The *trust patents* issued in fulfillment of that treaty and pursuant to the General Allotment Act of 1887 [24 Stat. 388 (sec. 5), as amended by Act of May 8, 1906, c. 2348, 34 Stat. 182] bound by the United States to convey the land "free of all charge or incumbrance whatever" at the end of the *trust period. Such* [trust] *patents* have uniformly been construed to grant to the Indians a broad exemption from all forms of taxation effecting the land.

Brief for the United States at 6-7, *Board of Comm'rs of Jackson County, Kansas v. United States*, 308 U.S. 343 (1939) (No. 1728) (emphasis added).

Although *Board of Comm'rs of Jackson County, Kansas* only involved the question of whether interest should be awarded when taxes were erroneously assessed, the opinion mentions the General Allotment Act and reflects the understanding of that time:

> The land which gave rise to this controversy, situated in Jackson County, Kansas, was [trust] patented under the General Allotment Act of February 8,

> 1887, 24 Stat. 388, 25 U.S.C. § 348. In pursuance of this Act, the United States agreed to hold the land for twenty-five years under the restrictions of the 1861 Treaty, subject to extension at the President's discretion. . . .
>
> In this legislative setting, the Secretary of the Interior in 1918, over the objection of M-Ko-Quah-Wah, cancelled her outstanding *trust patent* and in its place issued a *fee simple patent.* This was duly recorded in the Registry of Deeds for Jackson County. *In consequence* Jackson County in 1919 began to subject the land to its *regular property taxes.* It continued to do so as long as this *fee simple patent* was left undisturbed by the United States. . . . Jackson County in all innocence acted *in reliance on a fee patent* given under the hand of the President of the United States. . . . Here is a long, unexcused delay in the assertion of a right for which Jackson County should not be penalized. By virtue of the *most authoritative semblance of legitimacy under national law,* the land of M-Ko-Quah-Wah and the lands of other Indians had become part of the economy of Jackson County. For eight years after Congress had directed attention to the problem, those specially entrusted with the intricacies of Indian law did not call Jackson County's action into question. Whatever may be her unfortunate duty to restore the taxes which she had *every practical justification* for collecting at the time, no claim of fairness calls upon her also to pay interest for the use of the money which she *could not* have known was not *properly* hers.

Board of Comm'rs, 308 U.S. at 348-349, 352-353 (emphasis added).

In 1943, in a most instructive case that involved a special modification of the twenty-five year trust limitation of the General Allotment Act, the United States recounted to this Court that the General Allotment Act "has been *uniformly construed* as conferring upon the Indians a vested 25-year tax exemption. . . ." and the United

States conceded that subsequent to that period, the land was legally taxable. Brief for the United States at 17, 43, *Mahnomen County v. United States,* 319 U.S. 474 (1943) (No. 684) (emphasis added). The *Mahnomen* decision reflects this important concession in no uncertain terms:

> It is *conceded* that any limitation on the County's power to tax *expired* in 1928 with the termination of the twenty-five year trust described below.

Mahnomen, 319 U.S. at 475 (emphasis added).

Most of the important early cases of this Court are discussed in detail in the Brief for the United States, *Mahnomen,* No. 684. Although *Mahnomen* is a Minnesota case decided by this Court, and although it specifically deals with the Nelson Act and the taxation of real property owned by tribal members, the United States neglected to cite or discuss it in the court of appeals. Similarly, the court of appeals mentioned *Mahnomen* only in passing, as a case that simply "suggested that the land might only be free from taxation during the original trust period," and then cited the dissent for that proposition. *Leech Lake Band of Chippewa Indians v. Cass County, Minnesota,* 108 F.3d 820, 823 (8th Cir. 1997), Pet. App. 6. In this respect, the decision of the panel majority is in further conflict with a decision of this Court, as a thorough reading of *Mahnomen* attests.[5]

In 1952, the United States in *Bailess v. Paukune,* 344 U.S. 171 (1952), generally described two instances where it deemed taxation to be "forbidden by the General Allotment Act":

> [W]hether *under trust patents* or *under fee patents with restrictions* upon alienation. . . .

Brief for the United States at 2, *Bailess v. Paukune* (No. 242) (emphasis added).

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[5] *See also Nichols v. Rysavy,* 809 F.2d 1317 (8th Cir. 1987), *cert. denied,* 484 U.S. 848 (1987), and *County of Thurston v. Andrus,* 586 F.2d 1212 (8th Cir. 1978), *cert. denied,* 441 U.S. 952 (1979).

Bailess involved the taxation of land of an allegedly Indian widow, who in due course was to receive a "fee patent" for the interest she inherited from her husband in a trust allotment. The Court concluded her interest was taxable if she was a non-Indian and in the process noted:

> This allotment was made under the General Allotment Act of February 8, 1887, 24 Stat. 388, 389. . . . No fee patent to the land has issued to *Paukune,* to his widow, or to the son. The trust period of twenty-five years has from time to time been extended. In other words, the United States still holds the land in trust for *Paukune* and his heirs. . . .

Bailess, 344 U.S. at 171-172 (emphasis added).

In 1956, in an income tax case that involved the General Allotment Act, as amended by the Burke Act of 1906, 34 Stat. 182, the United States succinctly stated that:

> [T]his provision was undoubtedly intended *to make it clear* that Indian lands transferred *in fee* to the Indians would *thereafter* be subject to state and local taxation. . . .

Brief for the Petitioner at 13 n.4, *Squire v. Capoeman,* 351 U.S. 1 (1956) (No. 134) (emphasis added). The opinion of the Court accepted the basic premise of the argument:

> The Government argues that this amendment was directed solely at permitting state and local taxation *after a transfer in fee,* but there is no indication in the legislative history of the amendment that it was to be so limited. . . . The literal language of the proviso evinces a congressional intent to subject an Indian allotment to *all taxes only after a patent in fee* is issued to the allottee.

Squire, 351 U.S. at 7-8 (emphasis added).

In 1973, in *United States v. Mason,* 412 U.S. 391 (1973), the United States noted that the Court in *Squire*:

> [R]elied on language in an amendment to the General Allotment Act providing for *taxation of the land after the allottee receives a patent in fee* . . . [and] held that an amendment to the General Allotment Act created a tax exemption by implication, and that it required the return of the trust property without encumbrances at the end of the trust period . . . *and provided for taxation after the termination of the trust.*

Brief for the United States at 9-10, 17, *United States v. Mason*, 412 U.S. 391 (1973) (Nos. 72-654, 72-606) (emphasis added). The Court in *Mason* agreed:

> Moreover, the *Squire* decision rested heavily on the provision in the General Allotment Act providing for the removal of 'all restrictions as to sale, encumbrance, or taxation' *when Indian property is granted in fee. . . .*

Mason, 412 U.S. at 396 (emphasis added). Even Mr. Hobbs, arguing for the tribal respondents in oral argument, stated:

> The next thing that happens is that in 1906 Congress amends the General Allotment Act, and it says that—for the first time adds the idea that the trust period can end sooner than the 25 years intended if the Indian becomes competent sooner than that time. And it says that after he reaches the point of competency, the trust will end and he gets his land, and all restrictions as to alienation and *taxation are lifted.* This implies that Congress thought that the land was free of tax up to that point and well so. Over sixty years ago this Supreme Court, in 1903, had held that a restriction on alienation added up to a tax exemption. So, Congress assumed on very good authority in 1906 that the restriction on alienation was the equivalent of a tax exemption.

Tr. of Oral Argument at 38, *United States v. Mason*, 412 U.S. 391 (1978) (Nos. 72-654, 72-606) (emphasis added).

Most recently, in *United States v. Mitchell,* 445 U.S. 535 (1980), the United States reviewed the entire history of the General Allotment Act. Again, the United States told this Court the exemption to state taxation coincided with the trust period:

> The General Allotment Act . . . for the limited purposes of (a) restraining improvement alienation of the land by the allottees and (b) affording an immunity from state taxation for the period *during* which the legal title remained in the United States. . . .

Brief for the United States at 24, *Mitchell* (No. 81-1748) (emphasis added). In oral argument, Mr. Claiborne, arguing for the United States, said the same thing:

> That statute contemplated a scheme whereby the land of the reservaton would be divided among the Indians within 25 years, and in the *meantime,* the United States was simply to hold title in trust solely for the *purpose* of preventing state taxation, it being legal title in the United States and therefore exempt from state taxation.

Tr. of Oral Argument at 14, *United States v. Mitchell,* 445 U.S. 535 (1980) (No. 81-1748) (emphasis added). This Court agreed:

> [W]hen Congress enacted the General Allotment Act, it intended . . . to prevent alienation of the land and to ensure that allottees would be immune from state taxation.

Mitchell, 445 U.S. at 544. At the end of this conclusion, the Court quoted at length and added emphasis to the remarks of Representative Skinner, the sponsor in the House of Representatives: ". . . 'land *is made inalienable and non-taxable for a sufficient length of time.*' . . ." *Mitchell,* 445 U.S. at 544, n.5 (emphasis as in original except for a sufficient length of time). In dissenting, Justice White described the holding of the Court in the same terms:

> The Court holds, however, that the 'trust' established by § 5 is not a trust as that term is commonly understood, and that Congress had no intention of imposing full fiduciary obligations on the United States. Congress' purposes, it is said, were narrower: to impose a restraint on alienation by Indian allottees while ensuring *immunity from state taxation during the period* of the restraint.

Mitchell, 445 U.S. at 546, 547 (White, J., dissenting) (emphasis added). It is significant that the arguments the United States submitted in *Mitchell* were presented subsequent to the decisions of this Court that the United States now advances to undermine the same position.

C. All Related Opinions Reflect That The General Allotment Act Was Clearly Understood to Generally Authorize the Taxation of Fee Patent Land.

Immediately after the passage of the 1887 Act, the Secretary of the Interior requested and received an opinion from the Attorney General of the United States. Among other things, this opinion clearly ties the tax exemption to the twenty-five year trust period.

> I am also of the opinion that the allotment lands provided for in the act of 1887 are exempt from State or Territorial taxation upon the ground above stated with reference to the act of 1884, namely, that the lands covered by the act are held *by the United States for the period of twenty-five years in trust for the Indians,* such trust being an agency for the exercise of a Federal power, and therefore outside the province of State or Territorial authority.

19 Op. Atty. Gen. 161, 169 (1888) (emphasis added). Later, opinions from the Department of the Interior reinforced this accepted construction. 30 L.D. 258, 266-267 (1900), 50 L.D. 591 (1924), 53 L.D. 107 (1930), 53 L.D. 133 (1930). With specific reference to the original Nez Perce Indian Reservation, in 1930 the Interior Solicitor characterized the issue as follows:

> [T]he subsequent enactment of the general allotment act of 1887, embracing within its scope reservations such as the Nez Perce, created by treaty stipulation, and the making of allotments thereunder to the Indians with their consent as manifested, not only by the selections made by them, but by the subsequent agreement of 1894, make it plain that the provisions of the original treaty of 1863 relied upon as creating the tax exemption here claimed, were superseded by the provisions of the general allotment act.
>
> The rights of the Nez Perce Indians with respect to the lands allotted to them, are thus determined by the general allotment act of 1887 and as that act contains no provision exempting the allotted lands from taxation after issuance of fee simple patents upon expiration of the trust period, I am clearly of the opinion that such lands thereupon become subject to the taxing power of the State.

53 L.D. 133, 136 (1930), Co. App. 6a.

This construction of the 1887 Act is repeatedly reflected in every related opinion of the Department of the Interior thereafter until 1989. On April 21, 1989, the 1979 opinion that restated this position was simply rescinded. After citing several cases decided by this Court in the 1970s, an Associate Solicitor of the Department of the Interior reasoned that:

> [L]anguage in some of those decisions suggests the state is on weaker ground when it attempts to tax Indian ownership of land. . . .

Memorandum at 1, BIA. IA. 0943, April 21, 1989. The decision of this Court in *Yakima* authoritatively resolved that question.

CONCLUSION

Predictably, the United States will advance several reasons for this Court to wait for "another day" to review the questions presented in the Petitions. Nevertheless, fo the foregoing reasons, and those stated in the Petitions and supporting *amici* brief of the States, the Petitions for Writs of Certiorari should be granted.

Respectfully submitted,

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August 29, 1997

APPENDIX

APPENDIX

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

Mar. 22, 1979

Memorandum

To: Field Solicitor, Twin Cities

From: Associate Solicitor, Division of Indian Affairs

Subject: Taxability of Reservation Lands Owned by Indians in Fee

I am unable to agree with the position taken in the research paper enclosed with your memorandum of January 25, *i.e.*, that Indian-owned fee land within reservations is exempt from state and local real property taxation.

The research paper relies primarily on the principle of federal preemption of state power to tax, correctly stating that this method of analysis is the preferred one where state taxation questions are at issue. However, a fundamental aspect of the principle that Congress may preempt state taxation of Indians is that Congress may also give permission to the states to tax Indians or Indian property. Such permission has been given, with respect to real property taxation of fee lands, in 25 U.S.C. § 349.

In *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), the Supreme Court held that Indians within reservation boundaries are immune from state personal property taxes, vendor license fees, and cigarette sales taxes. In that case, the Court considered the general language in the part of 25 U.S.C. § 349 which provided that, upon the issuance of fee patents, allottees would become subject to *all* civil and criminal laws of the state. It found that this part of § 349 has been modified by or

at least requires interpretation in light of later legislation dealing with jurisdictional matters. This later legislation, the Court said, manifests Congressional intent to eschew checkerboard jurisdiction. Thus, the taxes at issue in *Moe*, which are civil laws of the state and fall within the scope of the first part of § 349, are inapplicable to Indians anywhere within reservation boundaries, regardless of the title status of land.

However, the same conclusion may not automatically be reached with respect to real property taxes, because those taxes are specifically addressed in a later part of § 349. The first proviso to that section provides in part that:

> "[T]he Secretary . . . may . . . cause to be issued to [an] allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of such land shall be removed. . . ."

The Supreme Court did not address this provision in *Moe*. In light of the specific taxing permission contained in the proviso, the Court's holding in *Moe* may not be extended to real property taxes, in the absence, at least, of a showing that the conditions existing with respect to those taxes are the same as those which led the Court to its conclusion in *Moe*, *i.e*, that subsequent legislation has modified this part of § 349.

I do not believe it can be said that the taxing permission in this proviso has been modified by later legislation. Rather than legislating in a manner inconsistent with it, Congress, since the General Allotment Act, clearly appears to have acted upon the assumption that land owned by Indians in fee is taxable. Subsequent legislation relating to land acquisition or sale, where taxation is mentioned, generally equates tax-exemption with trust or restricted status. *E.g.*, 25 U.S.C. 409a, 412a, 465, 501, 403-1; Act of July 24, 1956, 70 Stat. 626, § 3.

Section 349 applies, by its terms, to patents in fee issued for allotments. The Act of February 14, 1923, 25 U.S.C.

§ 335, extended the provisions of the General Allotment Act, including 25 U.S.C. § 349, to "all lands heretofore purchased or which may be purchased by authority of Congress for the use and benefit of any individual Indian or band or tribe of Indians." That statute has been construed to encompass lands purchased and taken in trust for individual Indians within the tax-exemption benefits of the General Allotment Act. *Stevens v. Comnr. of Internal Revenue*, 452 F. 2d 741 (9th Cir. 1971).

Likewise, I think the taxing permission in § 349 must be construed to apply to purchased land, certainly where land is purchased and taken in trust, and for which a patent in fee is later issued. Although it might conceivably be argued that land purchased in fee and not taken into trust does not fall within this permission, I think it is clear that the General Allotment Act and subsequent legislation, taken together, manifest Congressional understanding and intent that tax-exempt status of Indian land depend upon its being trust or restricted land.

Your § 2415 cases which depend upon a theory of nontaxability of fee land should be removed from your case list.

/s/ Thomas W. Fredericks
THOMAS W. FREDERICKS

EXCERPTS OF DECISION OF DEPARTMENT OF THE INTERIOR, 53 I.D. 133 (1930) RE TAXATION OF NEZ PERCE INDIAN ALLOTMENTS AFTER EXPIRATION OF TRUST PERIOD

Opinion June 30, 1930

NEZ PERCE INDIAN LANDS—ALLOTMENT—TAXATION.

The provision in the treaty of June 9, 1863, concluded with the Nez Perce Indians, for the allotment of lands in Idaho to individuals of that tribe, was, by the stipulations of the later agreement of August 25, 1894, superseded by the general allotment act of February 8, 1887, and the tax exemption of the allotted lands created by the treaty was abrogated.

NEZ PERCE INDIAN LANDS—ALLOTMENT—PATENT—TAXATION.

Upon the issuance of fee simple patents following the expiration of the 25 year trust period provided for in the general allotment act, the lands alotted to members of the Nez Perce Tribe of Indians become subject to taxation by the State in the same manner as property belonging to other citizens. *Goudy* v. *Meath* (203 U. S. 146), and *Larkin* v. *Paugh* (170 U. S. 431).

FINNEY, *Solicitor:*

You [Secretary of the Interior] have requested my opinion as to whether the lands allotted to the members of the Nez Perce Tribe of Indians in Idaho become subject to taxation by the State upon the issuance of fee simple patents therefor, following expiration of the 25 year trust period provided for in the acts under which these Indians were allotted.

The Nez Perce Indians were allotted lands in severalty pursuant to the provisions of the general allotment act of

February 8, 1887 (24 Stat. 388), and for the lands so allotted the allottees received patents of the form and legal effect provided in section 5 of that act which reads—

> That upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. * * *

The United States, under the foregoing provision, retained the legal title, giving the allottee a paper or writing inaptly termed a patent (*United States* v. *Nice*, 241 U. S. 591, 595), showing that at a particular time in the future, unless it was extended by the President, the allottee or his heirs, as the case might be, would be entitled to a regular patent, conveying the fee discharged of the trust and free of all charge and incumbrance. The United States thus retained its hold upon the land for a period of 25 years and as much longer as the President in his discretion might determine. While the statute contains no express provision with respect to taxation of the land during or after the expiration of the trust period, the intent of Congress in that regard is plain. During the restricted or trust period, the land is held by the United States for the allottee or his heirs, as a part of the general policy of dealing with the Indians and is being administered as a governmental instrumentality. While so held and

administered, no power rests in the State to assess and tax the same until at least the fee is conveyed to the Indian. *United States* v. *Rickert* (188 U. S. 432). Upon issuance of the fee simple patent following expiration of the trust period, however, the title passes from the United States to the allottee. The jurisdiction and authority theretofore possessed by the Secretary of the Interior by reason of the prior trust and restriction come to an end (*Larkin* v. *Paugh*, 276 U. S. 431), and the allottee becomes invested with full power of alienation and as a necessary incident thereof, the lands become subject to taxation in the same manner as property belonging to other citizens. *Goudy* v. *Meath* (203 U. S. 146).

* * * *

Under the treaty of 1863, by which the Nez Perce Reservation was created, the United States agreed to reserve the land for a home and the sole use and occupancy of said tribe. So far as here material, the treaty provided that immediately after ratification thereof, the President should cause the boundaries of the reservation to be surveyed and established, after which the cultivable land should be surveyed into lots of 20 acres each and one such lot assigned to each member of the tribe over the age of 21 years, or the head of a family, who desired it "as a permanent home for such person," and set apart for the perpetual and exclusive use and benefit of himself and heirs. Then followed the provision reproduced above with respect to the taxability and alienability of the lands assigned. The residue of the land was to be held in common for pasturage for the sole use and benefit of the Indians, with the provision, however, for future assignments of land from time to time as members of the tribe might come upon the reservation and claim the privileges granted by the treaty. By an amendatory treaty of August 13, 1868, ratified February 24, 1869 (15 Stat. 693), provision was made, among others, for the removal of Indians residing outside the reservation to allotments within the

reservation, or upon certain conditions such Indians might be allowed to remain on the lands then occupied by them upon the same terms and conditions as those within the reservation.

Examination of the records of the Indian Office, however, discloses that no allotments were made to the Indians under the provisions of these earlier treaties, because the Indians, being dissatisfied with the small quantity of land to which each was entitled, had refused to take such allotments. Matters stood thus when the general allotment act of 1887 was passed, section 1 of which provided that in all cases where "any tribe or band of Indians has been or shall hereafter be located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or Executive order setting apart the same for their use," the President is authorized, whenever in his opinion any such reservation or part thereof is advantageous for agricultural or grazing purposes, to cause the same to be surveyed and to allot the lands in severalty to any Indian located thereon in the quantities therein specified. Acting upon authority of this statute, which embraced within its scope reservations created by treaty stipulation, such as the Nez Perce, the President, on April 13, 1889, issued directions for the making of allotments of land in severalty to the Indians of the Nez Perce Reservation under the provisions of the general allotment act. Pursuant thereto, a schedule of allotments, based upon selections made by the Indians, was approved by the Secretary of the Interior on March 19, 1895, and trust patents therefor duly isssued to the allottees in conformity with section 5 of the general allotment act, as aforesaid.

In the act of August 15, 1894 (28 Stat. 286, 326, 327, 330), making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with the various Indian Tribes, will be found an agreement between the Nez Perce Tribe of Indians and

the United States, from which it appears that in making that agreement the parties proceeded under authority of the act of 1887. By that agreement, the Indians ceded, sold, relinquished and conveyed to the United States all their claim, title and interest in and to certain unallotted lands within the reservation, except certain specified tracts which they retained. The parties stipulated that the lands so ceded should not be open for settlement until "*trust patents*" *for the allotted lands* [italics supplied] had been duly issued and recorded and the first payment made to the Indians. Article 7 stipulated that all allotments made to the members who have died since the same were made, or may die before the ratification of the agreement, shall be confirmed "*and trust patents issued in the names of such allottees respectively.*" [Italics supplied.] Article 2 provided for relinquishments by certain allottees, with provision for the issuance of a new patent "of the form and legal effect prescribed by the fifth section of the act of February 8, 1887 (Twenty-fourth Statutes three hundred and eighty-eight), for the new allotment and that portion of the old allotment surrendered." It is significant to note that the earlier treaties contained no provision for the issuance of trust patents and the stipulations in this later agreement for the issuance of such patents as provided for in the fifth section of the general allotment act, clearly show that it was the understanding of the parties that the provisions of the general allotment act controlled in the matter of allotments, and the agreement can, therefore, have no other effect than to confirm the action of the President in causing the allotments to be made thereunder.

The refusal of the Indians to take allotments under the earlier treaties of 1863 and 1869, the subsequent enactment of the general allotment act of 1887, embracing within its scope reservations such as the Nez Perce, created by treaty stipulation, and the making of allotments thereunder to the Indians with their consent as manifested, not

only by the selections made by them, but by the subsequent agreement of 1894, make it plain that the provisions of the original treaty of 1863 relied upon as creating the tax exemption here claimed, were superseded by the provisions of the general allotment act.

The rights of the Nez Perce Indians with respect to the lands allotted to them, are thus determined by the general allotment act of 1887 and as that act contains no provisions exempting the allotted lands from taxation after issuance of fee simple patents upon expiration of the trust period. I am clearly of the opinion that such lands thereupon become subject to the taxing power of the State.

Approved:

Jos. M. Dixon,
First Assistant Secretary.

Supreme Court, U.S.
FILED
SEP 29 1997
CLERK

No. 97-14

In the Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether political subdivisions of the State of Michigan may impose *ad valorem* taxes on land that was once patented in fee pursuant to the Treaty of Oct. 18, 1864 between the United States and the Chippewa Indians, 14 Stat. 657, but that has since been repurchased by the Tribe or individual tribal members.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-10a) is reported at 106 F.3d 130. The memorandum opinion and order of the district court (Pet. App. 11a-45a) are reported at 882 F. Supp. 659.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1997. A petition for rehearing was denied on March 31, 1997. Pet. App 1a. The petition for a writ of certiorari was filed on June 30, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Prior to 1855, the bands composing the Saginaw Chippewa Tribe entered into several treaties with the United States under which the bands ceded vast portions of their aboriginal lands within the present-day State of Michigan. The bands consisted of the Saginaw, Swan Creek, and Black River Chippewa Indians. On August 2, 1855, the bands and the United States entered into a treaty, Treaty with the Chippewas, 11 Stat. 633, which set aside two locations for the bands' reservations. Pet. App. 13a-14a. The reservation relevant to this case consisted of a tract of six contiguous townships in Isabella County, Michigan (the Isabella Reservation).

On October 18, 1864, the Saginaw Chippewa Indians entered into their final treaty with the United States. Treaty with the Chippewa Indians (Treaty of 1864), 14 Stat. 657. The land allotment scheme under the 1864 Treaty provided for the issuance of two types of patents to lands selected by the Saginaw Chippewa Indians.[1] Under Article 3 of that Treaty, the Department of the Interior's Office of Indian Affairs was to issue unrestricted fee patents to the lands selected by those Indians identified as "competent" by the local agent, Pet. App. 61a, and was to issue restricted patents to those Indians identified as "not so competent," *id.* at 61a-62a. The 1864 Treaty barred alienation of the latter lands, except with the consent of the Secretary of the Interior. *Ibid.*

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[1] The 1864 Treaty also provided for the allotment of lands to certain groups of the Ottawa, Chippewa and Pottawatomie Indians "by permission of said [Saginaw] Chippewas * * * who now reside upon said reservation in Isabella county." Article 3, 14 Stat. 657 (Pet. App. 61a).

2. The specific land at issue in this case was originally allotted to James Gruette, a Saginaw Chippewa Indian, in May of 1871 by fee patent issued pursuant to Article 2 of the Treaty of 1864, 14 Stat. 657. Pet. App. 12a.[2] In April 1987, the Saginaw Chippewa Tribe (Tribe) purchased a portion of the subject property from a non-Indian owner in an effort to reacquire the original lands of the Isabella Reservation. The Tribe owns the purchased land in unrestricted fee simple; the United States does not hold the land in trust. Prior to the Tribe's purchase of the land, Isabella County and Union Township—political subdivisions of the State of Michigan—had assessed *ad valorem* real property taxes against the non-Indian owners of the land. Pet. 9. After the Tribe acquired the property, the Tribe maintained that petitioners lacked jurisdiction to tax the real property of a federally recognized Tribe. In February 1988, the Tribe paid $1,449.37 in satisfaction of its pro rata share of the 1987 taxes levied against the property. The Tribe has not paid any subsequent taxes, protesting petitioners' assertion of jurisdiction to tax Indian-held fee lands within the boundaries of an Indian reservation. Pet. App. 11a.

Petitioners issued delinquency notices to the Tribe for real estate taxes for the years 1988, 1989 and 1990, and issued a notice of tax sale regarding the property. Pet. 9. The tax sale has been stayed by petitioners pending the outcome of this litigation.

3. In April 1991, the United States brought this action on behalf of the Secretary of the Interior for

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[2] That allotment occurred prior to enactment of the Indian General Allotment Act, also known as the Dawes Act, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. 331 *et seq.*).

the benefit of the Saginaw Chippewa Indian Tribe of Michigan for declaratory, injunctive, and monetary relief. Pet. 9-10. The complaint averred that tribally-owned fee land on the Tribe's Reservation was exempt from assessment and levy of state *ad valorem* taxes, title forfeiture proceedings, and tax sales by state and local governments.[3] The Tribe intervened as a plaintiff. In response to the complaint, petitioners not only defended their right to tax Indian-owned fee lands as a general matter, but also (1) asserted that the lands at issue here are not within the jurisdictional boundaries of the present-day Isabella Reservation, and (2) challenged the continued existence of the Saginaw Chippewa Tribe. Pet. 10.

The district court bifurcated the proceedings, requiring separate briefing of the reservation and tribal-status issues, and the *ad valorem* taxation issue. After extensive briefing by all parties on the issues of the Reservation's boundaries and the Tribe's status, the district court ordered supplemental briefing on the taxation issue. Pet. 10. In its memorandum opinion and order, the court addressed only the *ad valorem* taxation issue, declining to resolve the issues of the Reservation's boundaries and the Tribe's status. According to the district court, those issues "d[id] not affect the propriety of the *ad valorem* property taxes levied [by petitioners]." Pet. App. 14a. In the district court's view,

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[3] In an amended complaint, the United States alleged that named individual tribal members also held fee title to land that originally had been allotted pursuant to the Treaties of 1855 and 1864. The allotted land ultimately came into fee ownership of the individual members upon repurchase by those individuals.

those taxes were valid even if the land involved is within the Reservation and the Saginaw Chippewa Tribe continues to exist. *Id.* at 14a-45a.

With respect to the taxation issue, the district court noted that, in *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992), this Court "assert[ed] that 'in the area of state taxation, * * * absent cession of jurisdiction or other federal statute permitting it,' states are without power to tax 'reservation lands and reservation Indians' absent 'unmistakably clear' Congressional intent." Pet. App. 17a (quoting *Yakima*, 502 U.S. at 258). The district court expressed the view that this "*Yakima* precept" was dictum but, in any event, held that it did not apply to lands that a Tribe owned in fee simple. *Id.* at 22a-23a. The court concluded that, because the Tribe could alienate the land at issue, it is subject to state taxation. *Id.* at 26a-29a, 35a-36a.

4. The court of appeals reversed, Pet. App. 2a-10a, concluding that under *Yakima*, "a treaty provision that makes Indian land fully alienable does not, by itself, rise to the level of 'unmistakably clear' congressional intent to give states the authority to tax such alienable Indian lands," *id.* at 6a-7a. The court explained that "[t]he Supreme Court has clearly stated the rule in such cases as follows: '[A]bsent cession of jurisdiction or other federal statutes permitting it, * * * a State is without power to tax reservation lands and reservation Indians.'" *Id.* at 2a (quoting *Yakima*, 502 U.S. at 258). The court further reasoned that "Congress is not deemed to have authorized state taxation unless it has 'made its intention to do so unmistakably clear.'" *Id.* at 2a-3a (quoting *Yakima*, 502 U.S.

at 258), and it held that the authority to tax must be expressed in the patenting provision under which the land was originally allotted, *id.* at 7a-8a. The court determined that neither of the treaties under which the land at issue was allotted manifested an "unmistakably clear" intent on the part of Congress to authorize state taxation of the Tribe's land. *Id.* at 6a.

The court of appeals rejected petitioners' argument that alienability alone dictates the taxability of tribally-owned land. Pet. App. 4a. The court pointed out that petitioners based their argument primarily on a statement that the *Yakima* Court made "during its discussion of an earlier case," *Goudy* v. *Meath*, 203 U.S. 146 (1906). Pet. App. 4a. The court noted as well that petitioners "argue[] that alienability necessarily implies taxability as a general proposition, instead of recognizing that the language of * * * the General Allotment Act * * * expressly tied the two together only for purposes of the Indian lands covered in that Act." *Id.* at 6a. The court explained that "[i]n *Yakima*, the Supreme Court held that 'by specifically mentioning immunity from land taxation as one of the restrictions that would be removed upon conveyance in fee, Congress in the Burke Act proviso [to Section 6 of the Indian General Allotment Act] manifested a clear intention to permit the state to tax such Indian lands.'"[4] *Ibid.* (quoting

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[4] The Burke Act proviso, added to Section 6 of the Indian General Allotment Act in 1906, provides:

> Provided, [t]hat the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be

Yakima, 502 U.S. at 259). The court therefore concluded that "the *Yakima* decision, properly interpreted, does not alter the general rule requiring an 'unmistakably clear' expression by Congress to allow state taxation of Indian land." Pet. App. 6a.

Likewise, the court of appeals declined to follow the Ninth Circuit's decision in *Lummi Indian Tribe* v. *Whatcom County, Washington*, 5 F.3d 1355 (1993), cert. denied, 512 U.S. 1228 (1994), in which the court held that the alienable status of Indian-owned fee land is the only factor governing taxability. The court below concluded that the *Lummi* decision was inconsistent with *Yakima*'s requirement that "Congress' intent to authorize state taxation of Indians must be unmistakably clear." Pet. App. 7a (quoting *Lummi*, 5 F.3d at 1358).

The court below also rejected petitioners' argument that the allotment provisions of the Treaties of 1855 and 1864 were superseded by the later-enacted Indian General Allotment Act. The court held that nothing in the language of the Indian General Allotment Act suggests that Congress intended for the Act either to bar land allocations under treaties that pre-dated the General Allotment Act, or to alter the "substantive rights of Indian owners of property that was allocated before Congress enacted the General Allotment Act." Pet. App. 9a-10a.

Lastly, the court noted that the case could not be finally decided in light of petitioners' contentions that the land at issue was not in fact within the

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issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed.

25 U.S.C. 349.

Reservation's boundaries and that the Tribe had been dissolved and thus was no longer properly eligible for immunity from state taxation. The court "express[ed] no opinion" on those issues and remanded to the district court for further proceedings. Pet. App. 3a, 10a.

ARGUMENT

1. In *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992), this Court addressed the general taxation question raised in this case, holding that the test for whether a State may impose an *ad valorem* property tax on lands owned in fee by a Tribe or its members within the Tribe's reservation turns on congressional intent. If Congress intended in "unmistakably clear" terms to permit particular taxes, then those taxes may be assessed. The holdings of the courts of appeals in this case and in *Leech Lake Band of Chippewa Indians* v. *Cass County*, 108 F.3d 820 (8th Cir. 1997), petition and conditional cross-petition for cert. pending, Nos. 97-174 and 97-235 (filed July 8 and Aug. 7, 1997), are consistent with *Yakima*.

In *Yakima*, the Court noted that "[t]he Yakima Nation contends it is not clear whether the parcels at issue in these cases were patented under the General Allotment Act, rather than under some other statutes in force prior to the Indian Reorganization Act" of 1934, 25 U.S.C. 461 *et seq.* 502 U.S. at 270. For that reason, the Court remanded the case for the lower courts to determine as a factual matter whether the land had been patented under a different provision of law and, if so, whether a different result was required as a legal matter with respect to those lands. This Court nowhere suggested in *Yakima* that the legal

test it applied—whether there was an "unmistakably clear" intent to permit taxation—was restricted to the General Allotment Act and that a different test might be employed under another statute or treaty.

Petitioners contend (Pet. 11-13) in the alternative that the Indian General Allotment Act applies to land conveyed under treaties that pre-date the Act, and therefore authorizes the *ad valorem* taxes at issue in this case. The court below fully considered and correctly rejected that contention. The court found that nothing in the Indian General Allotment Act indicates that the "substantive provisions of the Act were intended to apply to all grants of land under any treaty." Pet. App. 9a. Moreover, as the court below determined, the Act does not even suggest that "Congress intended either to bar allocations pursuant to pre-existing treaties or to alter the substantive rights of Indian owners of property that was allocated before Congress enacted the Indian General Allotment Act." *Ibid.* Rather, the court found that, pursuant to the express language of the General Allotment Act, until the President of the United States exercises the specific land allocating authority "delegated in the [General Allotment] Act, Section 6 allowing *ad valorem* taxation is not triggered." *Ibid.*[5]

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[5] Because the court of appeals held that the alienability of lands patented pursuant to the 1864 Treaty was not sufficient to render those lands taxable if they are now owned by the Tribe or its members, the court had no occasion to consider whether lands owned by the Tribe itself within the Reservation are actually alienable under the Indian Non-Intercourse Act, 25 U.S.C. 177, and whether such lands are otherwise immune from state taxation as a general aspect of the immunity of the tribal government from the operation of state laws.

2. Petitioners urge the Court to grant review because a conflict exists between the court of appeals' decision in this case and the Ninth Circuit's decision in *Lummi* regarding what analysis to use when deciding whether a State may impose an *ad valorem* property tax on Indian-owned fee land within an Indian reservation. See Pet. 14-18. In *Lummi*, the Ninth Circuit read this Court's decision in *Yakima* to mean that, regardless of the way in which Indian-owned land was originally allotted and patented, if Congress made the land alienable, it is taxable by the state or local government. 5 F.3d at 1357.

The *Lummi* majority acknowledged that its holding was a "proposition [that] may be hard to square with the requirement, recently approved by the *Yakima Nation* Court, that Congress' intent to authorize state taxation of Indians must be unmistakably clear." *Lummi*, 5 F.3d at 1358. Indeed, the dissent in *Lummi* pointed out that "*Yakima Indian Nation* is a case of statutory interpretation which presents a detailed analysis of the language and structure of the GAA as it applies to allotments and patents issued under its particular provisions." *Id.* at 1360. Accordingly, the *Lummi* dissent expressed the view that the majority there was required "to find the unmistakably clear intent of Congress to allow taxation on these particular lands, lands which do not come under the [General Allotment Act]" but, instead, were allotted under the Treaty of Point Elliot. *Ibid.*

Lummi was the first appellate case to address the issue of state taxation of Indian-owned reservation fee lands since *Yakima*, and no other court of appeals has followed that decision. To the contrary, two federal courts of appeals and one state supreme court have held that the proper analysis for determining whether

a State may tax reservation lands that a Tribe or tribal member owns in fee is to determine if the specific patenting provision of an allotment authority (whether treaty or statute) reveals an "unmistakably clear" intent of Congress to allow such taxation. Under that analysis, those courts have rejected the contention that lands allotted and patented pursuant to authority other than the General Allotment Act were subject to state taxation. See Pet. App. 7a; *Leech Lake*, 108 F.3d at 825-826; *In re Application of Kaul*, 933 P.2d 717, 730 (Kan. 1997). Moreover, since the Ninth Circuit rendered its decision in *Lummi*, this Court, in *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450 (1995), reaffirmed that under *Yakima*, "when a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, [the Court has] employed, instead of a balancing inquiry, a 'more categorical approach: "[A]bsent cession of jurisdiction or other federal statutes permitting it," * * * a State is without power to tax *reservation lands* and reservation Indians.'" *Id.* at 458 (quoting *Yakima*, 502 U.S. at 258) (brackets and emphasis added).

Because the holding in *Lummi* is contrary to *Yakima* and to other, more recent, circuit court decisions and a state supreme court decision, it would, in our view, be appropriate to afford the Ninth Circuit an opportunity to reconsider the issue in light of those decisions and this Court's decision in *Chickasaw Nation* before the circuit conflict is deemed so irreconcilable as to warrant this Court's review.

3. If the Court determines that review of the issue raised in the certiorari petition is warranted at this time, we suggest that *Cass County* v. *Leech Lake Band of Chippewa Indians*, petition and conditional

cross-petition for cert. pending, Nos. 97-174 and 97-235, would furnish a more appropriate vehicle for doing so.

This case is in an interlocutory posture. The question presented may be of no significance in this case if, on remand, the courts below decide either of two antecedent issues in favor of petitioners: whether the subject land is located within the jurisdictional boundaries of the Isabella Reservation, and whether the Saginaw Chippewa Tribe was terminated under the provisions of the Treaty of 1855.

The reservation-boundary and tribal-status issues have remained unresolved since the United States first filed this suit. Pet. 6, 8 n.3. The district court declined to resolve those issues, in view of its conclusion that petitioners could impose an *ad valorem* property tax on the land owned by the Tribe and its members even if the land is located within the Reservation's boundaries. After reversing that holding, the court of appeals properly remanded the case for resolution of the threshold reservation-boundary and tribal-status issues. On remand, the district court will have to determine whether the present-day Isabella Reservation consists of the lands selected pursuant to the 1855 Treaty and those specifically described in the 1864 Treaty, as well as lands added to the Reservation by federal law. The district court also will have to determine the meaning and effect of the Treaty of 1855 as it pertains to the Tribe's status.[6] Because this Court does not ordinar-

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[6] With respect to the tribal-status issue, petitioners state that although the parties disagree about the significance of the fact that the descendants of the Saginaws were able to organize a tribal government under the Indian Reorganization Act, 25

ily decide issues in an interlocutory posture, plenary review is not warranted in this case. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari and stating that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court").

Leech Lake presents essentially the same issue as does this case, but not in an interlocutory posture. In *Leech Lake*, the lands at issue were allotted pursuant to the Nelson Act (Chippewa Indians of Minnesota), 25 Stat. 642, which was enacted two years after passage of the Indian General Allotment Act. Thirteen parcels were allotted under sections of the Nelson Act that specifically incorporated the General Allotment Act. *Id.* at 822. The remaining eight parcels were allotted under sections that did not incorporate the General Allotment Act and did not "include any mention of an intent to tax lands distributed under them." *Leech Lake*, 108 F.3d at 829. The issue before the court was whether the State could impose an *ad valorem* property tax on the Indian-owned fee lands within the Tribe's reservation. Thus, if the Court concludes that the question of state taxation of Indian-owned reservation fee lands presented by this case and *Leech Lake* warrants review at this time, *Leech Lake* would be a better vehicle than the instant case for resolution of that question. If the Court does grant review in *Leech Lake*, the certiorari petition in this case

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U.S.C. 461 *et seq.*, all parties, with the exception of the City of Mount Pleasant, are "generally in agreement that the Tribe does exist today by virtue of its 1937 federally approved constitution." Pet. 8 n.3.

should be held pending the Court's decision in *Leech Lake* and then be disposed of in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, if the Court grants review in *Cass County* v. *Leech Lake Band of Chippewa Indians*, petition and conditional cross-petition for cert. pending, Nos. 97-174 and 97-235, the petition in this case should be held pending the Court's decision in that case and then be disposed of as appropriate in light of that decision.

Respectfully submitted.

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